THE GROWING ROLE OF FORTUITY IN TEXAS CRIMINAL LAW

GERALD S. REAMEY*

"Do You Feel Lucky? Well, Do Ya, Punk?"[1]

I. INTRODUCTION

Luck almost certainly is not a prominent feature of anybody's ideal criminal justice system. Criminal responsibility usually attaches only when mens rea combines with volitional conduct—or the withholding of some required act—to produce a public harm.[2] These component parts of criminal

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* Professor of Law, St. Mary's University School of Law; J.D. 1976, LL.M. 1982, Southern Methodist University. The author gratefully acknowledges the research assistance of Jeb Lock and Rhodes Hamilton in the preparation of this article. The author also benefited greatly from the very helpful criticisms and suggestions that Michael Ariens, Kay Reamey, and John Schmolesky offered. They deserve a large share of credit for whatever value this piece may have, but they share no blame for any errors that remain. Dave Moran generously shared his work on this topic, reassuring the author that Texas is not the only jurisdiction to base criminal punishments in part on bad luck.

1. DIRTY HARRY (Warner Studios 1971).

2. *See, e.g.*, Arnold H. Loewy, *Culpability, Dangerousness, and Harm: Balancing the Factors on which our Criminal Law is Predicated*, 66 N.C. L. REV. 283, 283 (1988); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 3 (3d ed. 2001) (Criminal law involves investigation of "doctrines that have developed over the centuries for determining when a person may justly be held criminally responsible for harm that she has caused."); *id.* at 81 (noting actus reus and mens rea are two components of crimes, generally); WAYNE R. LAFAVE, MODERN CRIMINAL LAW: CASES, COMMENTS AND QUESTIONS 113 (3d ed. 2001) ("[C]rime consists of both a physical part and a mental part.").

responsibility are widely accepted and utilized to define what is a "crime."[3] Taken together, they express the simple but powerful idea that one is accountable to society for the consequences of what one does, but only if mental fault[4] prompted the act. A voluntary act that produces even the most horrible harm is usually not criminal without an accompanying mental fault;[5] it is an "accident."[6] Similarly, culpability alone is not punished,[7] in large part because its occurrence in human beings is too common to bear sanction unless it results in action.

The origins of these precepts may be ancient, but they continue to be the foundations on which substantive criminal law is built.[8] Even a cursory examination of the contents of contemporary criminal law casebooks confirms that mens rea coinciding with actus reus to cause a result, equals criminal responsibility.[9]

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3. *See* JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 14–26 (2d ed. 1960) (The theory of penal law reflected in traditional and current codes of various countries includes culpability and act provisions.); *see, e.g.*, VOLKER KREY, GERMAN CRIMINAL LAW: GENERAL PART 97 (2002) (German criminal law requires culpability, the principle of *nulla poena sine culpa.*).

4. By "mental fault" I do not intend necessarily to connote a normative judgment about the mental state of the actor. Many crimes are expressions of social regulation unrelated to right-or-wrong, or to good-or-evil. They merely promote order in society, or regulate certain activities. In the traditional dichotomy, these offenses are concerned with *mala prohibita* instead of *malum in se.* Mental fault and similar expressions of a culpable mental state are used in this article to refer to a broader kind of "fault" or "blame," namely, the kind that distinguishes punishable acts from accidents. It is the kind of fault that Wayne LaFave says more accurately describes "what crimes generally require in addition to their physical elements." LAFAVE, *supra* note 2, at 113.

5. The United States Supreme Court observed in the *Morrissette* case:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.

Morrissette v. United States, 342 U.S. 246, 250 (1952).

6. Sargent v. State, 518 S.W.2d 807, 809 (Tex. Crim. App. 1975) ("No act done by accident is an offense against the law.").

7. *See* LAFAVE, *supra* note 2, at 113 (The basic premise for the mens rea requirement is captured by Latin maxim *actus not facit reum nisi mens sit rea* (an act does not make one guilty unless his mind is guilty).).

8. *See* sources cited *supra* note 2.

9. *See, e.g.*, LAFAVE, *supra* note 2, at 113 (Crime consists of both a physical part and a mental part.); MYRON MOSKOVITZ, CASES AND PROBLEMS IN CRIMINAL LAW 17 (4th ed. 1999) (Mens rea and actus reus are required for "every crime."); RUSSELL L. WEAVER, ET AL., CRIMINAL LAW: CASES, MATERIALS AND PROBLEMS 53 (2002) (Voluntary act or omission and mens rea requirements are essential elements of just punishment.). Of course this is not literally true in every case. Strict liability crimes omit the culpability requirement altogether, but some have argued that due process is violated by applying strict liability to "serious" crimes with substantial punishments. *See* DRESSLER, *supra* note 2, at 147–48 (remarking that strict liability raises constitutional questions). Likewise, culpability in the form of failure to perform a required duty may be punished although there is no "act" committed. These "omission" crimes merely reflect, however, that a culpable failure to act can have foreseeable consequences and be punished

Strikingly at odds with this traditional formula is the trend in recent Texas criminal law to punish actors for the harm they cause, regardless of their culpability and conduct. Some of the examples of this departure from the notion of complete individual responsibility are not new. The crime of felony-murder, for instance, punishes a criminal actor for what actually happens, and not only for what he contemplates.[10]

The felony-murder doctrine has been widely debated,[11] and states have adopted differing limitations on the rule.[12] More recent applications of the "lottery approach"[13] to criminal responsibility seem increasingly to pass into the criminal justice armory with scarcely a notice, much less the robust and continuing discussion that accompanied and has continuously dogged felony-murder.

Moreover, the variations on this "fault-lite" view of crime and punishment extend beyond mere substantive criminal statutes. Causation rules and punishment enhancements have also been affected by a decreasing reliance on culpability. The reach of criminal sanction has been extended on many fronts, as amply illustrated by changes in, and interpretations of, Texas law. While some of the examples from Texas are unusual—perhaps even unique—others are found in other jurisdictions.[14]

The purpose of this article is not to identify and describe every instance in which Texas law departs from the traditional notion of punishment based strictly and proportionately on individual fault. Rather, the purpose is, through examination of selected examples, to consider the ways in which this departure manifests itself in Texas, and to discuss

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only if the duty to act is clearly established by law.

10. Clayton T. Tanaka & Larry M. Lawrence, II, *The Felony-Murder Doctrine*, 36 LOY. L.A. L. REV. 1479, 1480 (2003) (For the felony-murder doctrine, it is irrelevant whether killing was intentional or accidental.); Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 CORNELL L. REV. 446, 447–48 (1985) (The felony-murder rule makes it possible that the most serious sanctions might be applied to accidental homicide.).

11. *See* DRESSLER, *supra* note 2, at 516.

12. *See* DRESSLER, *supra* note 2, at 519–27 (discussing ways in which the doctrine has been limited).

13. By "lottery approach," I mean to suggest—and will demonstrate—that guilt and punishment are determined to a significant degree by chance, rather than by reference to consequences that reasonably might be expected to ensue from certain actions. As will be explained further *infra*, felony-murder has an element of chance in the outcome because the actor who sets out to commit a felony other than homicide or assault may find himself or herself prosecuted, convicted, and punished as a murderer, despite a complete absence of intent to cause that result, or even a substantial risk. While some states have limited the scope of the doctrine in an effort to prevent this very eventuality, Texas and others arguably have applied felony-murder statutes in exactly this way.

14. It is not within the scope of this article to discuss whether Texas serves as a model in this regard for other jurisdictions, or whether Texas is simply following the example of others. Probably, both are true to some extent.

whether the interests served by these "new" ways of conceptualizing criminal responsibility adequately and satisfactorily account for the interests arguably better served by a more restrictive definition of criminal fault.

II. THE ROLE OF FAULT AND HARM

Fault-based punishment serves a principal purpose of criminal law: deterrence.[15] If a person foresees harm, or at least the possibility of a certain kind of harm, he or she might be able to weigh the risk of punishment for causing that degree of harm against the anticipated benefits (e.g., money, property, revenge, satisfaction, etc.) of committing the crime. Ideally, this calculus produces—at least sometimes, and perhaps often—a decision that the potential costs outweigh the likely benefits, and the person chooses not to act.

Culpability, the voluntary act requirement, causation, and the degree of punishment play important, interdependent roles in this cost-benefit analysis. To begin, consider the various degrees of culpability employed in Texas.

Following the Model Penal Code's template, Texas uses a four-tier gradation of culpability, ranging from intent[16] to criminal negligence.[17] To act intentionally is to have the "conscious objective or desire to engage in the conduct or cause the result."[18] The actor with this state of mind ordinarily foresees the harm his conduct will cause; indeed, it may well be his purpose to bring about that harm. At the other end of the culpability scale lies criminal negligence. The criminally negligent actor does not intend to cause a particular kind of harm; he or she is not even aware that a risk of such harm exists.[19] The actor should be aware of the risk, though, for there is a "substantial and unjustifiable risk" that the "result will occur."[20] If the actor turns her mind to the possible outcomes of her conduct, and if she appreciates risk as society expects a reasonable person to do, she will see the harm that might result.[21]

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15. It also is retributive, particularly when its degree is determined in part by the quantum of harm done to a victim.

16. Acting "intentionally" under the Texas Penal Code corresponds to acting "purposely" for Model Penal Code crimes. *Compare* TEX. PEN. CODE ANN. § 6.03(a) (Vernon 2003), *with* MODEL PENAL CODE § 2.02(2)(a) (1985).

17. *See* TEX. PEN. CODE ANN. § 6.03(d).

18. *Id.* § 6.03(a).

19. *See id.* § 6.03(d) (A person is criminally negligent "when he ought to be aware of a substantial and unjustifiable risk.").

20. *Id.*

21. If the actor did understand the risk, she would not be criminally negligent by proceeding, but would be reckless. *Id.* § 6.03(c).

What is the practical result of this difference? The person who does not perceive the risk, but should have, is punished for failing to appreciate the risk posed by his behavior.[22] If he knows of the risk and takes it, he is more culpable than the unwitting risk-taker, more culpable still if the risk he perceives is extremely high,[23] and most culpable if he not only knows of the high risk, but actually intends the result. As the actor's degree of fault increases, so does his or her punishment—at least, usually.

In Texas law, this dynamic is illustrated by the homicide statutes.[24] They include murder,[25] manslaughter,[26] and criminally negligent homicide.[27] Generally speaking, these offenses differ only in culpability and in punishment, the act requirement and causation being the same for each.[28] As the culpability level decreases, the punishment level decreases accordingly.[29] Murder, which requires an "intentional" or "knowing" killing, is a first degree felony.[30] Manslaughter, or reckless killing, is a second degree felony; and criminally negligent homicide is a state jail felony.[31]

This ordering of punishment based on degree of culpability is quite common in the Model Penal Code and Texas Penal Code. It reflects the rather common-sense view that the guiltier mind deserves stronger punishment in order to satisfy the need for proportional sentences. If culpability, voluntary act, and causation work in concert to achieve a legitimate goal of criminal justice, then an "increase" in any one of these

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22. It may also be said that he is punished for failing to have the capacity for appreciation we expect of the "reasonable person."

23. This person is said to act "knowingly." TEX. PEN. CODE ANN. § 6.03(b).

24. *See generally id.* § 19 (Vernon 2003 & Supp. 2004–2005) (homicide statutes). Essentially the same scheme exists in the Model Penal Code. *See generally* MODEL PENAL CODE § 210 (1985) (same).

25. Texas also has the crime of "capital murder," which is distinguished from "murder" only by the existence of aggravating factors which result in a punishment of death or life imprisonment. *Compare* TEX. PEN. CODE ANN. § 19.03 (Vernon Supp. 2004–2005), *with id.* § 19.02 (Vernon 2003).

26. *Id.* § 19.04 (Vernon 2003). Texas no longer differentiates between voluntary manslaughter and involuntary manslaughter. "Heat of passion" killing, previously considered voluntary manslaughter, is now included within the murder statute because it, like murder, is intentional killing, but with a mitigating feature.

27. *Id.* § 19.05.

28. The notable exception is felony-murder, which does not require any level of culpability for the killing itself. *See id.* § 19.02(b)(3). Felony-murder is discussed in more detail *infra* Part III.

29. This generality does not always apply, even for homicide. Felony-murder is a notable exception to the general principle, not because no intentional wrong is intended (although one might not be), but because the intent in felony-murder is limited to the underlying felony rather than to the killing.

30. TEX. PEN. CODE ANN. § 19.02(c).

31. *Id.* §§ 19.04(b), 19.05(b). Punishment ranges are described in the Texas Penal Code. *See id.* § 19.03 (Vernon Supp. 2004–2005).

elements produces a greater likelihood of public harm, and should be met—as it is in the basic Texas homicide scheme of increasing degrees of mental fault—in a greater effort to deter that harm through punishment. In other words, if the harm being addressed is unlawful killing,[32] a more direct "intent" to bring about that result should be punished more severely in order to serve both deterrence and retribution purposes if volition and the degree of harm remain constant.

While harm is an important part of the definition of crime,[33] it must be remembered that the harm being addressed by criminal law is "public harm," which is not necessarily that harm suffered by the immediate crime victim.[34] For this reason, punishment for criminal conduct is tied more closely to culpability than to the amount of harm suffered. That is not to say, of course, that degree of harm plays an inconsequential role in criminal responsibility. In assault crimes, for example, the degree of harm, often expressed in terms of "bodily injury," "serious bodily injury," or death, plays its own part in determining the punishment range for an offense.[35] Similarly, in property crimes the dollar value of the item stolen or damaged may decide the range of punishment.[36] Notwithstanding the significance of degree of harm, a common sense of proportionality in punishment demands more emphasis on culpability than on harm. To demonstrate this ranking, consider capital murder, a crime in which the ultimate punishment can be exacted only for intentional or knowing killing.[37] By contrast, criminally negligent homicide—a crime in which the harm (death) is exactly the same—is barely a felony.[38]

Voluntary act and causation are not as likely to vary in this analysis because ordinarily they either exist, or they do not. Unlike culpability, if an act does not quite "cause" the public harm, the threshold of causation simply has not been crossed and the actor is not held responsible. Similarly, if an act is a "little voluntary," but does not satisfy the minimum voluntariness required for criminal sanction, there has been no crime.[39]

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32. Unlawful killing necessarily requires a voluntary act that causes death.

33. *See* HALL, *supra* note 3, at 213.

34. *See* DRESSLER, *supra* note 2, at 1 (noting crime is distinguished from civil wrong by "social harm" done, rather than private injury).

35. *Compare* TEX. PEN. CODE ANN. § 22.01 (Vernon Supp. 2004–2005) (simple assault causing bodily injury with varying culpability levels), *with id.* § 22.02 (aggravated assault—a felony—for causing serious bodily injury).

36. *See, e.g.*, *id.* § 31.03(e) (theft punishment gradation scheme based on property value).

37. *Id.* §§ 19.03(a) (Vernon Supp. 2004–2005), 19.02(b)(1) (Vernon 2003).

38. *See id* § 19.05 (Vernon 2003). It is a state jail felony, the lowest felony classification. *Id.* § 19.05(b). Manslaughter, which is a reckless killing, is a second degree felony. *Id.* § 19.04.

39. Acts required for inchoate crimes, discussed elsewhere in this article, may appear at first to be an exception to this generalization. They are not, though, because the act—which does not constitute a sufficient act for the proposed or attempted crime—is wholly sufficient for the

With these generalizations about the culpability-act-causation-result relationship in mind, it is possible to discern a pattern, and perhaps a trend, in Texas criminal law running against the traditional formula for individual responsibility and proportionate punishment. As noted, one of the more prominent illustrations of this is felony-murder, especially as practiced in Texas.

III. TEXAS FELONY-MURDER AND WHY IT'S BETTER TO BE LUCKY THAN TO BE CAREFUL

The origins of felony-murder lie in a period of English common law in which virtually all felonies were punishable by death.[40] In that environment, it was unimportant whether one labeled as murder an accidental death occurring in the course of committing another felony. Punishment for the underlying felony was exactly the same as that for murder. As the number and kind of non-dangerous felonies grew, the rule became less satisfactory, as illustrated by the following statement of this development by Professor Jerome Hall in his classic work, *General Principles of Criminal Law*:

> When early law distinguished voluntary harm-doing from misadventure, it remained for a long period content if the former were involved in any manner that could be related to the actual harm. The rule was that a person who intentionally caused any injury should be responsible for any resultant harm, however unforeseeable or accidental that might be. The felony-murder, misdemeanor-manslaughter rules rose to check the range of this rationalization of penal liability as regards criminal homicide; and the ancient formulas, *mala in se—mala prohibita*, provided ready pegs on which to rest these important limitations. It became established that the defendant must have intended to commit a harm that was legally proscribed and that his liability for the homicide would to some substantial extent be determined by reference to the gravity of the harm he intended to commit. The next step was to restrict such penal liability by requiring the offender to be reckless with reference to the death caused by him in the commission of a crime. Thus the progress of criminal law in the [nineteenth] century reached the point of almost eliminating the felony-murder, misdemeanor-manslaughter rules, and this has been

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inchoate "crime." Thus, it is not correct to say that an attempted crime is not a completed crime. In a very real sense, it is. It is accurate to say that the act constituting the attempt does not complete the attempted crime, but that is a different thing altogether.

40. *See* Roth & Sundby, *supra* note 10, at 450 ("[T]he [felony-murder] rule's purpose was not fully articulated because all felonies at common law were punished by death . . . ."). It is not literally true that at the time of creation of the felony-murder doctrine all felonies were punishable by death. *See* Guyora Binder, *The Origins of American Felony Murder Rules*, 57 STAN. L. REV. 59, 92 (2004) (noting that not all felonies of the period were dangerous, or capital offenses).

> achieved in the 1957 English Homicide Act. This promising development was, however, interrupted and in some states even reversed; in the United States, the common law rules and analogies drawn from them remain very much alive. The consequence is that negligence and even chance occurrences enter into the determination of penal liability . . . . This, of course, cannot be reconciled with the dominant and, it is believed, sound meaning of the principle of *mens rea*.[41]

While felony-murder does remain very much alive in the United States,[42] the rule has been limited in a number of ways in order to make it more palatable, and more consistent with contemporary understanding of criminal responsibility.[43] One of the common ways in which felony-murder has been limited is by requiring that the underlying felony be dangerous to life,[44] a limitation that serves the deterrence rationale.[45]

If the purpose of felony-murder is to prevent would-be felons from pursuing their felonious intent in a manner that endangers others by exposing the actors to possible murder charges, then the rule should reflect that purpose by excluding "safe" felonies from its reach,[46] or by encouraging felons to commit even dangerous crimes more carefully.[47] On the other hand, if the rule is intended only to deter in some general way the commission of all felonies, limitation is unnecessary, but then, efforts to deter all felonies would be ill-served by the felony-murder rule in any event. Any deterrent effect must be nearly nonexistent for the felon committing a "safe" felony because he or she is not deterred by the

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41. HALL, *supra* note 3, at 129–30 (footnotes omitted).

42. It has been noted that, "The United States . . . remains virtually the only western country still recognizing a rule which makes it possible 'that the most serious sanctions known to law might be imposed for accidental homicide.'" Roth & Sundby, *supra* note 10, at 447–48.

43. *See* Lawson v. State, 64 S.W.3d 396, 398–99 (Tex. Crim. App. 2001) (Cochran, J., concurring); DRESSLER, *supra* note 2, at 519–27; WAYNE R. LAFAVE, CRIMINAL LAW 744–55 (4th ed. 2003) [hereinafter CRIMINAL LAW]; Roth & Sundby, *supra* note 10, at 446–47 (noting that most states have limited the rule's potential harshness).

44. CRIMINAL LAW, *supra* note 43, at 745.

45. One scholar unimpressed by the deterrence argument has noted that, "The need to rationalize the felony-murder rule in deterrent terms arises only because of the rule's conflict with accepted culpability principles." James J. Tomkovicz, *The Endurance of the Felony-Murder Rule: A Study of the Forces that Shape Our Criminal Law*, 51 WASH. & LEE L. REV. 1429, 1450 (1994).

46. *See id.* at 1448–49.

47. George Fletcher stated the proposition this way:

> [T]he state justifiably threatens robbers who cause death with an additional punishment in order to make them, as it were, "careful" robbers—they should do everything possible to minimize the risk of death. Imposing this additional burden on them is not considered unjust, for they, as robbers, have embarked on a forbidden course of endangering human life.

GEORGE P. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 193 (1998).

unforeseeable consequence of harm to another, and would not imagine death as a possible result of the intended crime.[48] Even felons bent on committing dangerous felonies probably would not be deterred by a death that might result. Assuming then that dangerousness, instead of the commission of felonies generally, is the chief evil at which the felony-murder doctrine is aimed, a state might craft its limitation in one, or both, of two ways.

For example, a state could limit felony-murder to those underlying felonies that are inherently dangerous,[49] such as armed robbery. Commission, or attempted commission, of these "dangerous" felonies makes foreseeability of death at least likely, and certainly culpable.[50] Two important problems lurk in this approach, though. First, it is sometimes difficult for courts and would-be felons to determine with precision whether the felony is "inherently dangerous."[51] In the absence of clarity about this central characteristic, it is unlikely the law will achieve a deterrent effect. The second problem is that this approach applies the rule mechanically,

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48. The Delaware Supreme Court stated the role of foreseeability of harm in felony-murder this way:

> The only rational function of the felony-murder rule is to furnish an added deterrent to the perpetration of felonies which, by their nature or by the attendant circumstances, create a foreseeable risk of death. This function is not served by application of the rule to felonies not foreseeably dangerous. The rule should not be extended beyond its rational function. Moreover, application of the rule to felonies not foreseeably dangerous would be unsound analytically because there is no logical basis for imputing malice from the intent to commit a felony not dangerous to human life.

Jenkins v. State, 230 A.2d 262, 268–69 (Del. 1967).

49. CRIMINAL LAW, *supra* note 43, at 746; DRESSLER, *supra* note 2, at 519; FLETCHER, *supra* note 47, at 193. By "inherently dangerous," I mean only that the crime, stated in the abstract, is per se dangerous, and not that the crime may be committed in a dangerous fashion. DRESSLER, *supra* note 2, at 519.

50. An armed robber scarcely could avoid appreciating the high risk to human life involved in the venture. That awareness of risk amounts to recklessness for any killing (intent exists for the underlying robbery), a culpability that is less than that ordinarily required for murder punishment, but one that at least includes foreseeability. However unlikely, it is possible for even the armed robber subjectively to be unaware of the risk involved, a possibility that undermines to some extent the accepted rationale for felony-murder. *See* DRESSLER, *supra* note 2, at 520. Unawareness of the risk is nevertheless culpable if criminal negligence can be the basis for homicide, though it would not be the basis for murder.

51. Theft often has been included within the list of dangerous felonies, but is it "dangerous" to the victim? In terms of physical injury, the answer usually is no. Indeed, it is the intent of the thief that the crime go unnoticed. There is no doubt, however, that theft may be committed in a dangerous fashion or with foreseeably dangerous consequences. Possession of a firearm by a convicted felon is another such offense. The crime does not seem dangerous per se; it is what the felon does with the firearm that makes the crime dangerous, not the possession of the weapon. And yet, the crime has been held to be inherently dangerous. *See* State v. Moffitt, 431 P.2d 879, 894–95 (Kan. 1967), *overruled on other grounds by* State v. Underwood, 615 P.2d 153, 162–63 (Kan. 1980) ("[C]ircumstances of the commission of the felony should not be considered in making the determination.").

without regard for the way in which the offense was committed. A "safe" felony might be committed in a dangerous manner, just as a dangerous felony might be committed "safely."[52] If preventing injury and death is the aim of the rule, the rule should be stated and applied with sufficient flexibility to account for the way in which the felon chooses to act, and not merely by reference to an often arbitrary characterization. Indeed, it is this emphasis on the manner in which the felony is committed that is the second way a state might limit felony-murder to cases involving dangerousness.[53]

Texas has employed the felony-murder doctrine continuously since before the Civil War.[54] Applying a transferred intent view of the doctrine, felony-murder cases in nineteenth-century Texas almost invariably involved violent felonies and resulted in first-degree punishment.[55] When the Texas Penal Code was revised in 1973 to incorporate much of the Model Penal Code, Texas broke with the Model Code's relegation of felony-murder to a mere presumption.[56] Instead, the state modified its stance on the rule in a different way: it limited its application to deaths caused by the commission or attempted commission of "an act clearly dangerous to human life."[57] By selecting this phrasing for the limitation, the Texas Legislature opted for a dangerous manner of commission view, rather than for the inherently dangerous felony approach.[58]

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52. Consider armed robbery, a felony that is on everyone's list of inherently dangerous crimes. If the robber carries an unloaded pistol but does not display it during the robbery, he may be guilty of armed, or aggravated, robbery. *See, e.g.*, TEX. PEN. CODE ANN. § 29.03 (Vernon Supp. 2004–2005). Regardless of the care taken by the robber for the lives of the persons being robbed, and the absence of any significant probability of harm, the robber nevertheless could be convicted of murder if a person dies accidentally in the course of the crime because the felony is inherently dangerous. In this example, the robber may be acting carefully precisely because of the possibility of enhanced punishment, as Professor Fletcher suggests. *See* FLETCHER, *supra* note 47, at 193. When that care produces the desired result, the rule works well, but when a person is harmed despite the care exercised by the felon, and the death is ruled a felony-murder, the deterrence effect of the rule is undermined by the indeterminable result.

53. *See* DRESSLER, *supra* note 2, at 520.

54. S*ee* Binder, *supra* note 40, at 167–71 (discussing the origins and development of felony-murder in Texas).

55. *See id.* (discussing the Texas felony-murder cases of the nineteenth century). Texas has been called the "felony murder center of America during the nineteenth century, with about one-fourth of all the reported felony murder convictions in the country." *Id.* at 167.

56. *See* MODEL PENAL CODE § 210.2(1)(b) (1962).

57. *See* TEX. PEN. CODE ANN. § 19.02(b)(3) (Vernon 2003). This precise formulation does not seem to exist in the current penal statutes of any other state, at least with respect to felony-murder. *See also* GERALD S. REAMEY, CRIMINAL OFFENSES AND DEFENSES IN TEXAS 214 (3d ed. 2000).

58. *See* TEX. PEN. CODE ANN. § 19.02(b)(3). The Texas felony-murder statute provides:

> (b) A person commits an offense if he:
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> . . . .
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> (3) commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from

Texas's formulation focuses on the danger created by the actor rather than on the nature of the felony, thereby leaving open the possibility that virtually any felony might trigger the operation of the rule.[59] Shifting the focus of the rule to the way in which the felony is committed allows Texas courts to continue to view felony-murder as they did in the nineteenth century, essentially a transferred intent provision.[60] In essence, the felony-murder rule now effectively "dispenses with the necessity to prove the mens rea for murder by substituting proof of the requisite culpability for the primary felony."[61] This kind of "free transfer" is inconsistent with common-law transferred intent principles, at least for unlike crimes,[62] but might be justifiable in the Texas version if foreseeability of harm is inherent to some considerable extent in doing an act "clearly dangerous to human life."[63]

How, then, does the Texas felony-murder doctrine depart from generally accepted notions of culpability, individual responsibility, and proportionate punishment? The answer lies, not in the language of the statute alone, but also in the way the provision has been applied.

Felony-murder cases in Texas usually involve what other states would

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> the commission or attempt, *he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.*

Id. (emphasis added). In her concurring opinion in *Lawson v. State*, Judge Cochran of the Texas Court of Criminal Appeals explained the Texas limitation:

> The Texas Legislature chose to narrow the common law felony murder rule set out in section 19.02(b)(3) of the Penal Code in two distinct ways. First, the statute requires that, regardless of the specific underlying felony (always excepting manslaughter, of course), the defendant must commit an act that is "clearly dangerous to human life." Instead of simply enumerating specific felonies which, in the abstract, are usually dangerous, the Legislature required that the state prove that this specific actor, under these specific circumstances, did some act that was clearly dangerous. This limitation preserves the original justification for the felony murder rule—a person is criminally responsible for the consequences of his dangerous and violent criminal conduct—while protecting the defendant against prosecution for murder for an unforeseeable death which occurs during the commission of a felony which is violent in the abstract, *but not in the particular case.* Second, the Legislature narrowed the proximate cause relationship in the felony murder rule. Not only must the defendant commit an act that is clearly dangerous to human life, it must also be that specific act which causes the victim's death.

Lawson v. State, 64 S.W.3d 396, 399–400 (Tex. Crim. App. 2001) (Cochran, J., concurring) (emphasis added) (footnotes omitted).

59. *See, e.g.*, Rodriguez v. State, 548 S.W.2d 26, 29 (Tex. Crim. App. 1977) (Only voluntary and involuntary manslaughter are exempted as underlying felonies for felony-murder.).

60. *See* Binder, *supra* note 40, at 169–70 (finding nineteenth century felony-murder in Texas was based on transferred intent); REAMEY, *supra* note 57, at 214 (describing current felony-murder rule as a "statutory version of transferred intent").

61. REAMEY, *supra* note 57, at 214; *see also* Johnson v. State, 4 S.W.3d 254, 255 (Tex. Crim. App. 1999); Garrett v. State, 573 S.W.2d 543, 545 (Tex. Crim. App. 1978).

62. *See* DRESSLER, *supra* note 2, at 518 (stating felony-murder is "a misuse of the transferred intent doctrine").

63. TEX. PEN. CODE ANN. § 19.02(b)(3).

label inherently dangerous felonies.[64] Occasionally, though, a nonviolent felony is the basis for felony-murder. Consider, for example, *Rodriguez v. State*,[65] a case in which the felony was the possession of a weapon on licensed premises.[66] The co-defendants argued to the Texas Court of Criminal Appeals that the offense did not involve intentional violence, in fact, they had left the bar when asked to do so, and without any violence being threatened.[67] Once outside, they called for the bar's owner to come out, but before he did, he was struck in the head and killed by a shot fired into the building from the defendants' pistol.[68]

Although the underlying felony was complete before the killing occurred, the defendants were convicted of felony-murder.[69] The Texas Court of Criminal Appeals rejected the argument that the conviction could not rest on evidence of a nonviolent felony, noting that the legislature exempted only voluntary and involuntary manslaughter from the scope of felonies to which felony-murder applies.[70] The court reversed the conviction, though, because the defendants were not in "flight" from the commission of the felony, and the State had therefore not proven an element of the offense.[71]

Rodriguez illustrates one of the conceptual problems Texas courts have had with the doctrine. A better-reasoned response to the defendants' argument about the character of the offense in *Rodriguez* would have been that the Texas felony-murder statute has nothing to do with the "inherent" nature of the felony. The clear language of the text requires a determination that the felony was committed in a dangerous fashion, and there was nothing about Rodriguez's conduct while committing the felony that would have caused death. Had it acknowledged that fact, the court would have sustained the appellants' point of error without reaching the question of whether they were in flight from the felony, although the court's finding that the felony had terminated before the violent act was committed seems correct.

Implicit in the *Rodriguez* court's view of felony-murder is that even

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64. *See, e.g.*, Flores v. State, 102 S.W.3d 328, 335 (Tex. App.—Eastland 2003, pet. ref'd) (finding child victim died of blunt trauma injury to head inflicted by defendant, which was felony injury to a child).

65. 548 S.W.2d 26 (Tex. Crim. App. 1977).

66. *Id.* at 28.

67. *See id.* at 29 (finding evidence that defendants left immediately when told to leave and they were not chased out or threatened).

68. *Id.* at 28.

69. *Id.* at 27–28.

70. *See id.* at 29–30 (stating there was sufficient evidence that defendants had possession of a weapon while on a premises licensed for the sale of alcoholic beverages—a felony).

71. *Id.*

felonies not involving actual violence or threat of violence may be the predicate upon which a murder conviction is based. This cannot be so, however, for two reasons. First, that reading simply does not comport with the language of the statute that the felony (or flight from it) must be accompanied by an "act clearly dangerous to human life."[72] Second, traditional transferred intent cannot support that interpretation.

Transferred intent, as applied to felony-murder, would borrow the general intent to commit the felony and use it to supply the intent required for murder.[73] But the principle of transferring intent requires that essentially equivalent "intents" be involved, at least unless the actor foresees the result that her intended conduct will produce.[74] This was not the case in *Rodriguez*,[75] and it probably would not be true in almost all "non-dangerous" felonies. What Rodriguez intended—the underlying felony of possession of a weapon on licensed premises—was not the equivalent of homicide in terms of social harm,[76] and in the absence of any act placing another in danger of death, punishment for murder is obviously disproportionate for what was intended or risked.

Moreover, freely transferring intent from a nonviolent felony to murder eases the prosecution's burden of proving the culpability element beyond a reasonable doubt in a way that creates a due process problem.[77] If it would be difficult for the state to prove that the defendant intentionally, or even recklessly, killed someone in the course of committing a felony, unrestricted transferred intent would permit the state nevertheless to convict of murder simply by showing an intent to commit the felony.[78]

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72. TEX. PEN. CODE ANN. § 19.02(b)(3) (Vernon 2003). Because there was no "act clearly dangerous," it also could not be the proximate cause of the death of the victim, another element required by the Texas statute. *Id.*

73. *See* DRESSLER, *supra* note 2, at 518 (citing the "felony-murder rule is sometimes defended on the basis of the transferred intent doctrine" arguing that the "felon's intent to commit a felony is transferred to the homicide").

74. *See id.* In which event, transferred intent is a highly artificial and unnecessary way to deal with the culpability requirement for the unintended crime. *Id.* (providing an example of how the transferred intent doctrine is misused).

75. It appears that the pistol Rodriguez displayed in the bar was unloaded, at least until he left the bar. *See* 548 S.W.2d at 28 ("Rodriguez displayed a pistol, pointing it out the door and clicking it.").

76. DRESSLER, *supra* note 2, at 518 (finding, ordinarily, transferred intent does not apply to an actor's intent to cause one social harm to be transferred to a different and greater social harm); Roth & Sundby, *supra* note 10, at 454 (noting "[t]he inapplicability of transferred intent to felony murder [is] evident when the crime's two different *mens rea* elements are examined: the intent to commit the felony and the culpability for the killing").

77. *See* Roth & Sundby, *supra* note 10, at 455–57 (discussing the use of "constructive malice," like transferred intent, is akin to a conclusive presumption raising "grave constitutional questions").

78. *See* DRESSLER, *supra* note 2, at 519 (noting the felony-murder rule operates to ease prosecutor's burden of proof).

Undoubtedly, this option is attractive to prosecutors, but as Professor Hall observed, it "cannot be reconciled with the dominant and, it is believed, sound meaning of the principle of *mens rea*."[79] In effect, using transferred intent in this way punishes the felon for being a bad person, and not for acting dangerously.[80] As Oliver Wendell Holmes observed, "To make an act which causes death murder, then, the actor ought, on principle, to know, or have notice of the facts which make the act dangerous."[81]

A somewhat different, but related, problem with the felony-murder formulation in Texas is that these cases virtually always involve an act that could be viewed as dangerous to human life. After all, a death has occurred because of something the felon has done in the course of his crime. How could that act not be dangerous? The proof of its dangerousness is in the result.[82] So, to borrow facts from the *Rodriguez* case, if the pistol had discharged accidentally inside the bar and killed the owner, possessing the pistol on licensed premises must have been "clearly dangerous to human life" because someone died.

Texas courts have not expressly adopted this position, but it is possible to see its influence at work in *Loredo v. State*.[83] Pedro Loredo and an accomplice set out to burglarize a restaurant.[84] Once inside the building, Loredo used a gas torch in an effort to melt the lock on the establishment's safe.[85] He later said in a statement to police that papers on a desk may have been ignited by the torch, but an accomplice testified that a third actor started a fire by using a lighter to ignite papers in cabinets in the office, the place where the fire investigator concluded the fire was set.[86] Two firefighters were asphyxiated and died in the fire, and the defendant was charged with felony-murder.[87] Loredo contended on appeal from his conviction that the evidence was insufficient to establish that he had

79. HALL, *supra* note 3, at 129–30.

80. *See* CRIMINAL LAW, *supra* note 43, at 763 (noting the felony-murder doctrine punishes one who is a "bad person" with a "bad state of mind" who has caused a "bad result").

81. OLIVER WENDELL HOLMES JR., THE COMMON LAW 56 (1881).

82. In *Depauw v. State*, the appellant argued the jury should have been given a limiting definition of "act clearly dangerous" in the jury instruction because otherwise, "the jury will likely always conclude that an act which caused a person to die was an act clearly dangerous to human life." 658 S.W.2d 628, 634 (Tex. App.—Amarillo 1983, writ ref'd). The Amarillo Court of Appeals rejected the argument, holding that the term has a "common and ordinary meaning so that a juror could properly understand such term." *Id.* One Texas author has noted, "No court has yet defined precisely the parameters of the concept 'act clearly dangerous to human life.' There is no meaningful way to distinguish between acts that are so dangerous and those that are not." 6 MICHAEL B. CHARLTON, TEXAS PRACTICE SERIES: TEXAS CRIMINAL LAW 135 (2d ed. 2001).

83. 130 S.W.3d 275 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd).

84. *Id.* at 277.

85. *Id.* at 278.

86. *Id.* at 279.

87. *Id.* at 278.

committed an "act clearly dangerous to human life" because starting the fire was the independent act of his accomplice.[88]

The Houston Court of Appeals agreed that the evidence regarding the fire was "conflicting," and noted that the State was bound to prove that the defendant intended to promote or assist the setting of the fire by the "primary actor."[89] Without discussing what evidence supported that finding, the court held the evidence sufficient to establish a dangerous act, citing defendant's knowledge that the restaurant was on fire when he left the building without trying "to put it out or call the fire department."[90]

If, as the *Loredo* court's opinion seems to concede, the defendant was not shown to have set the fire, intended that it be set, or known that it would be set, it is hard to imagine what clearly dangerous act the defendant committed. Surely it could not have been that he left the fire burning without calling the fire department, especially because firefighters were the victims. One supposes the court would not prefer that he place firefighters in the very danger from which they succumbed, and the court cited no legal duty on the defendant's part to extinguish the flames or report the fire.[91] Following a repetitious recitation of the circumstances surrounding the burglary, a review of the law of felony-murder, and the court's apparent

88. *Id.* at 279.

89. *Id.* at 279–80.

90. *Id.*

91. Perhaps the court believed, without saying so, that a legal duty existed because the defendant created a peril, and therefore owed a duty to the firefighters which he breached by failing to warn them. But if there was insufficient evidence to believe that he created the peril by setting the fire or aiding and abetting the person who did so, then no duty was shown to exist.

The strange case of *Mallard v. State* directly involved the role of omission as an "act clearly dangerous to human life" in felony-murder. 162 S.W.3d 325, 327–29 (Tex. App.—Fort Worth 2005, pet. filed). In the very early hours of the morning, and after a night of drug and alcohol use at a club, Chante Jawan Mallard struck a pedestrian while driving herself home. *Id.* at 328. The man she struck was thrown onto the hood of Mallard's car and hit the windshield, where he remained stuck. *Id.* Rather than stopping to render aid, Mallard continued driving, parked her car in her garage and put the door down. *Id.* The victim was alive and moaning when Mallard drove into the garage. *Id.* Later in the morning, she told a friend what had happened, and, after touching the body with a rake, the friend decided that the victim was dead and should be removed from the windshield and buried. *Id.* With the help of his cousin, the friend removed the body and eventually left it at a park where it was discovered later. *Id.* A medical expert testified at trial that the initial impact did not kill the victim, and would not necessarily have caused him to die. *Id.* at 330–31. Death was from loss of blood from the failure to receive medical aid. *Id.* at 331–32. The defendant was charged with felony-murder, the underlying felony being failure to stop and render aid. *Id.* at 329. The "act clearly dangerous to human life" was the *failure* to summon aid for the victim, an omission. *See id.* The court of appeals held the evidence to be factually and legally sufficient to support the defendant's conviction, despite her contention that an omission could not satisfy the "act clearly dangerous" requirement. *Id.* at 329–32. The appellate court also rejected Mallard's argument that the jury charge was defective for including an instruction on Texas's broad transferred intent provision. *Id.* at 333.

abandonment of the argument that the defendant set the fire himself,[92] the *Loredo* court concluded without any real explanation that, "a rational trier of fact could have found beyond a reasonable doubt appellant, while in the course of committing burglary, was a party to lighting a fire, an act clearly dangerous to human life, which caused the deaths of two firefighters."[93]

Cases like *Loredo* and *Rodriguez* at a minimum suggest that the "limiting" factor in Texas felony-murder cases limits very little. There is, however, another limit on the scope of felony-murder. Unfortunately, that "limit" recently has been virtually removed in Texas.

As Professor Dressler explains:

> Most states recognize some form of "independent felony" or "collateral felony" limitation. That is, the felony-murder rule only applies if the predicate felony is independent of, or collateral to, the homicide. If the felony is *not* independent, then the felony *merges* with the homicide and cannot serve as the basis for a felony-murder conviction.[94]

This limitation is known as the "merger doctrine."[95]

The practical effect of the merger doctrine is to prevent the State from elevating to murder every assault resulting in death. Every homicide necessarily includes a felony assault because causing serious bodily injury or death to another converts simple assault to felony (aggravated) assault.[96] Consequently, in the absence of a merger limitation on felony-murder, a prosecutor wishing to avoid having to prove an intentional or knowing killing could simply prove that the actor committed—perhaps unintentionally[97]—an act amounting to assault that produced death. For example, if a person lightly shoves another and causes him to trip, hit his head and die, without the merger doctrine a felony-murder conviction could be based on the felony assault (intentionally shoving) resulting in death.

What prevents such a manifestly unjust prosecution? Only the

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92. *See Loredo*, 130 S.W.3d at 280. After describing the role of the torch wielded by the defendant, and reciting the opinions of experts as to the source of the fire, the court concluded that the defendant "was a party to lighting a fire." *Id.* Despite the court's acknowledgment that party liability requires proof of intent to promote or assist the criminal act, it never answered in its opinion the defendant's claim that the fire was set without his prior knowledge, participation, or intent. *See id.*

93. *Id.*

94. DRESSLER, *supra* note 2, at 520.

95. *Id.*

96. TEX. PEN. CODE ANN. § 22.02(a) (Vernon Supp. 2004–2005). An assault also may be aggravated to a felony by using or exhibiting a deadly weapon. *Id.* § 22.02(a)(2).

97. Aggravated assault in Texas requires that the actor assault another, resulting in serious bodily injury (which includes death). *Id.* § 22.02(a)(1). The simple assault may be committed by intentional, knowing, or reckless conduct. *Id.* § 22.01(a)(1). To act knowingly or recklessly is to act unintentionally. *See id.* § 6.03(b)–(c) (Vernon 2003).

restraint of the public prosecutor. And if that fails, what prevents a murder conviction with its manifestly disproportionate punishment? Only the good sense and self-restraint of a jury.[98]

Until 1978, the only form of merger doctrine existing in Texas lay within language of the murder statute. The Texas Penal Code specifically excepts manslaughter[99] from the felonies that can form the basis for felony-murder.[100] In 1978, the Texas Court of Criminal Appeals joined the mainstream of states[101] employing felony-murder by extending the statutory limitation to include the felony assault that is the predicate for murder.[102] Writing for the court, Judge Odom concluded that continuing to allow felony-murder to rest upon felony assault "would make murder out of every aggravated assault that results in a death . . . because murder is usually the result of some form of assault."[103]

A scant three years later, the court of criminal appeals backtracked on its decision in *Garrett* in a habeas case entitled *Ex parte Easter*.[104] *Easter* involved felony injury to a child victim. Despite the obviously assaultive nature of the offense that caused the child's death, the court refused to apply the merger doctrine, reasoning that injury to a child was not a lesser-included offense of murder, and therefore not precluded by the doctrine.[105] With this decision, a considerable number of felony assaults became available again to support unintentional murder prosecutions.[106]

Perhaps *Ex parte Easter* should have been seen as the writing on the

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98. Of course, if the "act clearly dangerous to human life" limitation were taken seriously, one would not expect a felony-murder conviction. But, if nonviolent felonies are within the scope of the rule, and if the resulting death is sufficient evidence upon which to find the dangerous act, only the sound discretion of the charging and fact-finding authorities stands between the unlucky aggressor and conviction.

99. Previously, the statute excepted voluntary and involuntary manslaughter, but when voluntary manslaughter—"heat of passion" killing—was abolished as a separate offense and incorporated as a mitigating factor within the punishment scheme for murder, involuntary manslaughter—reckless killing—became the only form of manslaughter. *See* TEX. PEN. CODE ANN. § 19.04 (Vernon 2003).

100. *Id.* § 19.02(b)(3).

101. Russell R. Barton, *Application of the Merger Doctrine to the Felony Murder Rule in Texas: The Merger Muddle*, 42 BAYLOR L. REV. 535, 541 (1990) (noting "[the merger rule is] followed in the majority of jurisdictions in the United States"); Gail W. Stewart, *Felony Murder in Texas: The Merger Problem*, 33 BAYLOR L. REV. 1035, 1038 (1981) (The merger doctrine is the prevalent rule in most American jurisdictions.).

102. *See* Garrett v. State, 573 S.W.2d 543, 546 (Tex. Crim. App. 1978).

103. *Id.* at 545.

104. 615 S.W.2d 719, 721 (Tex. Crim. App. 1981) (en banc).

105. *Id.*

106. *Easter* was roundly criticized by commentators. *See* Barton, *supra* note 101, at 542 (finding the rationale of *Easter* does not justify exception to merger rule); Stewart, *supra* note 101, at 1038–43 (analyzing and concluding that the result in *Easter* was not supported by precedent or statute).

wall. What remained of the merger doctrine was criticized by some courts,[107] and after a twenty-one-year experiment with merger, the court of criminal appeals in 1999 returned Texas to the small group of states with felony-murder but no merger doctrine. The court held in *Johnson v. State*[108] that *Garrett* "did not create a general 'merger doctrine' in Texas," but "stands only for the proposition that a conviction for felony murder under section 19.02(b)(3), will not lie when the underlying felony is manslaughter or a lesser included offense of manslaughter."[109] *Ex parte Easter* conceivably could have been read in the fashion described by the *Johnson* opinion, but *Garrett* itself clearly established a merger doctrine in the classical sense by specifically excluding aggravated assault as a possible underlying felony.[110]

If any doubt remained after *Johnson* about the continuing viability of merger in Texas, the court of criminal appeals resolved that doubt just two years later in *Lawson v. State*.[111] Unlike *Johnson*, which involved felony injury to a child, Lawson was a felony-murder case built on aggravated assault.[112] A plurality of the court held, without elaboration, that because intentional or knowing aggravated assault is not a lesser-included offense of manslaughter, the merger doctrine did not apply.[113] Writing for herself and two other concurring judges, Judge Cochran expressed the state of affairs this way: "Does the judicially created merger doctrine still apply in Texas felony murder cases? The majority declines to say. But if the *Garrett* merger doctrine does still exist, it has been distinguished, limited, disagreed with, and eroded into virtual nonexistence by this Court."[114] Judge Meyers, the author of the court's opinion in *Johnson*, noted in his dissent to *Lawson* that, "the majority's opinion permits precisely the type of circumvention we cautioned against in *Garrett* and 'make[s] murder out of every aggravated assault that results in death.'"[115]

The confluence of these streams of judicial interpretation leaves felons at the mercy of fate. A lucky person commits a felony and no one gets hurt. An unlucky person does exactly the same and finds himself charged with murder.

If the "act clearly dangerous" element of felony-murder is essentially

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107. *See* REAMEY, *supra* note 57, at 218 n.30.
108. 4 S.W.3d 254 (Tex. Crim. App. 1999).
109. *Id.* at 258.
110. *See* Garrett v. State, 573 S.W.2d 543, 545–46 (Tex. Crim. App. 1978).
111. 64 S.W.3d 396 (Tex. Crim. App. 2001).
112. *Id.* at 396.
113. *Id.* at 397.
114. *Id.* at 401 (Cochran, J., concurring).
115. *Id.* at 403 (Meyers, J., dissenting) (alteration in original) (quoting *Garrett*, 573 S.W.2d at 545).

meaningless, and the merger doctrine is virtually nonexistent, Texas now has reverted to the primitive view[116] that bad people should be punished for whatever harm they cause,[117] without concern for whether they intended, or even could foresee,[118] that outcome. Because "[a]ggravated assault is surely an inherently dangerous felony,"[119] and that assault, which includes even unintended harm, can itself be the basis for felony-murder, conviction and punishment lie, not in the hands and mind of the felon, but in chance and prosecutorial whim.

This criticism was captured nearly twenty years ago in the following general observation regarding felony-murder:

> The "evil mind" theory conflicts with the basic premise that "the criminal law is concerned not only with guilt or innocence in the abstract but also with the degree of criminal liability." Although the general culpability rationale was perhaps sufficient as long as a general intent of wrongdoing established malice aforethought, it conflicts with the progressive trend of categorizing homicide according to the degree of culpability. Indeed, the felony-murder rule viewed from a general culpability perspective effectively eliminates a mens rea element in convicting a felon for a killing occurring during the commission of a felony, and results in the rule operating as a strict liability crime: the occurrence of a killing is punished as murder regardless of the defendant's culpability.[120]

The "evil mind" or "bad person" principle now operates in Texas through its felony-murder rule, despite the existence of better alternatives. Since the adoption into Texas law of the Model Penal Code's culpability-grading scheme,[121] transferred intent—whether in its general manifestation[122] or through felony-murder—is an unnecessary fiction. If a felon negligently kills another in the course of committing his crime, he is guilty of two offenses: the felony and criminally negligent homicide. If she recklessly causes a death by fleeing the felony crime scene at a high rate of speed, she commits manslaughter. And if he intentionally shoots a convenience store clerk during a robbery, he is guilty of aggravated robbery and capital murder, not because he committed a felony assault (a dangerous

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116. *See* Roth & Sundby, *supra* note 10, at 458–59 (The "evil mind" theory of felony murder is based on seventeenth and eighteenth century ideas of English criminology and relies on a "primitive rationale.").

117. Causing societal harm is not considered sufficient in itself to make a person blameworthy. *See* Tomkovicz, *supra* note 45, at 1470.

118. As Holmes wrote, "A harmful act is only excused on the ground that the party neither did foresee, nor could with proper care have foreseen harm." HOLMES, *supra* note 81, at 57.

119. *Lawson*, 64 S.W.3d at 400 (Cochran, J., concurring).

120. *See* Roth & Sundby, *supra* note 10, at 459 (footnotes omitted).

121. *See* MARKUS D. DUBBER, CRIMINAL LAW: MODEL PENAL CODE 80–82 (2002).

122. *See* TEX. PEN. CODE ANN. § 6.04(b) (Vernon 2003).

act), but because the State should match the punishment to the degree of blameworthiness by proving his intent. On the other hand, if the felon acts as society wants felons to act—safely—and a death occurs despite the actor's lack of culpability, that death should not be punished any more than any other accident.[123]

IV. ANOTHER PECULIAR APPLICATION OF CRIMINAL TRANSFERRED INTENT

The reliance on transferred intent principles is not limited to felony-murder in Texas. Embedded within the causation section of the Texas Penal Code is this provision:

> (b) A person is nevertheless criminally responsible for causing a result if the only difference between what actually occurred and what he desired, contemplated, or risked is that:
>
> (1) a different offense was committed; or
>
> (2) a different person or property was injured, harmed, or otherwise affected.[124]

On its surface, the section appears to be an unremarkable expression of the common transferred intent principle that if a person intends to harm another person or property, he remains responsible even if his aim is bad, or he mistakenly burns the wrong building.[125] A closer examination of the language, however, reveals an extraordinarily broad formulation for which there is no statutory clarification or limitation.

Does the statute really mean that regardless of what one sets out to do, she is criminally responsible for any offense committed, and any degree of harm inflicted? Does the section sweep even more broadly than felony-murder by encompassing all manner of crimes and public harms? Or instead, does the phrase "the only difference" limit responsibility to that which is foreseeable to the actor? Relatively few Texas cases rely on section 6.04(b), probably because the same result is available through felony-murder and for co-conspirator liability.[126] Those cases that do rely on the section amply demonstrate its potential for the same mischief that infects felony-murder.

The Texas Court of Criminal Appeals decided *Sargent v. State*[127] after

123. *See* Tomkovicz, *supra* note 45, at 1472 ("Scholars and the public agree that, except in the special cases presented by public-welfare type criminal enactments, accidents should not be punished.").

124. TEX. PEN. CODE ANN. § 6.04(b).

125. CRIMINAL LAW, *supra* note 43, at 338–42.

126. *See* TEX. PEN. CODE ANN. § 7.02(b).

127. 518 S.W.2d 807 (Tex. Crim. App. 1975).

section 6.04(b) had become effective, but its decision was controlled by prior law. *Sargent* involved a dispute between a pimp and his prostitute's customer in which the defendant's testimony was that he accidentally shot and killed the customer during a confrontation about the fee.[128] Reviewing the law of Texas at that time, the court stated the general principle of criminal responsibility: "No act done by accident is an offense against the law."[129] The court rejected the appellant's claim that the trial court should have instructed the jury on accidental homicide, however, because the defensive issue is available only "where the activity engaged in by the defendant is lawful."[130] Citing prior Texas Penal Code Article 42, the predecessor to section 6.04(b),[131] as a transferred intent provision, the Texas court held that, "one intending to commit a felony, who accidentally commits another felony is not legally excused but will receive the punishment affixed to the felony actually committed."[132]

This sweeping pronouncement of transferred intent reflects the broad language of section 6.04(b)(1) holding a person responsible for whatever offense actually occurs, if he sets out to commit some other offense.[133] What remained unclear after *Sargent* was the extent to which the general principle it restated would be applied, and whether the court would reconsider its position under the guise of interpreting new Texas Penal Code language. Would the sparsely worded new statute, for example, support a conviction for murder if the actor caused death by acting recklessly?[134] The existence of statutorily defined culpability gradations in the new code strongly suggested that transferred intent in this sense was an anachronism that should be discontinued, but those structural changes seemed to have no effect in the strange case of Thomas Earl Honea.[135]

Honea and a companion were bent on robbery as they waited in their potential victim's barn.[136] When he entered, the two robbers grabbed him and threw him to the ground, tying him up and gagging him.[137] After securing their victim, the men took $1,200 from the stock manager's shirt pocket and left him lying face down on the dusty floor of the barn.[138]

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128. *See id.* at 807–09.
129. *Id.* at 809.
130. *Id.*
131. Price v. State, 861 S.W.2d 913, 916 (Tex. Crim. App. 1993) ("Section 6.04(b) replaced article 42.").
132. *Sargent*, 518 S.W.2d at 809.
133. *See* TEX. PEN. CODE ANN. § 6.04(b)(1) (Vernon 2003).
134. *See* REAMEY, *supra* note 57, at 66.
135. *See* Honea v. State, 585 S.W.2d 681, 685 (Tex. Crim. App. 1979).
136. *See id.* at 684.
137. *Id.*
138. *Id.*

According to a pathologist who examined the man's body, the victim inhaled dust which likely caused him to cough and vomit.[139] He suffocated because he had aspirated that vomitus into his lungs.[140]

Honea confessed to the robbery, and there was no dispute about the way it was carried out.[141] But he was not charged with simple robbery, instead, the charge was aggravated robbery, a crime carrying the most serious felony penalty, excepting only capital murder.[142] The defendant objected that the State's evidence failed to establish that he had "intentionally and knowingly caused serious bodily injury" as required by the aggravated robbery statute.[143] To put it more succinctly, he claimed in effect that he had committed the robbery safely.

Given Texas's penchant for felony-murder, it is hard to understand why the State did not pursue that charge instead. The underlying felony was wholly different from manslaughter or even assault, and the act of binding and gagging a victim and leaving him face down in the dust probably would have satisfied Texas courts that it was "clearly dangerous to human life." Perhaps the explanation lies in the fact that both offenses are first degree felonies carrying the same punishment.

Whatever the reason for the charging decision, aggravated robbery carried the additional burden of establishing that Honea's intent to commit robbery sufficed to convict him of a crime he clearly did not intend: aggravated robbery. Relying this time on the language of section 6.04(b), the Texas Court of Criminal Appeals observed, "It is well settled that one who, intending to commit a felony, accidentally commits another felony, is guilty of the felony actually committed. The intent to commit the contemplated offense transfers to the offense in fact committed."[144] The court rejected the defendant's claim that the evidence established that he acted, at most, recklessly or with criminal negligence, and concluded that "[a]ppellant clearly intended to rob [the victim]; his acts resulted in the offense of aggravated robbery, and he is guilty of that offense."[145]

By continuing to use incorrectly a much criticized doctrine to punish a "bad person," the Texas court missed an opportunity to exploit one of the great advantages of the culpability scheme the legislature recently had

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139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 683.

143. *Id.* at 684–85. In Texas, robbery is aggravated by causing serious bodily injury to the victim, using or exhibiting a deadly weapon, or causing bodily injury to elderly or disabled persons, or threatening or placing such persons in fear of imminent bodily injury or death. TEX. PEN. CODE ANN. § 22.02(a) (Vernon Supp. 2004–2005); REAMEY, *supra* note 57, at 410.

144. *Honea*, 585 S.W.2d at 685.

145. *Id.*

adopted. Honea confessed that he was guilty of robbery. He had the requisite intent and did the act constituting the offense. It also is clear that Honea's participation in the offense left him open to a charge of manslaughter or criminally negligent homicide because some risk was involved in leaving the victim bound and gagged on the dusty floor.[146] But what else would society expect Honea to do? Ideally, he would be deterred from committing the robbery in the first place, but that deterrence comes—if at all—from the robbery statute, not from the aggravated robbery statute that punishes an outcome he tried to avoid and probably could not have foreseen. Does the reasonable person expect a robbery victim lying bound and gagged to vomit and suffocate? As robberies go, Honea's does not seem dangerous.

The decision to hold Honea responsible for a more serious crime because of the unintended and unanticipated outcome signaled a continuing, expansive use of the "lottery approach" to criminal justice in Texas. Unless the State wishes for retributive purposes[147] alone to punish people like Honea for the unintended and unforeseeable harm that is caused[148] by their conduct, the interpretation of section 6.04(b)(1) must be limited at least to that which reasonably would enter the imagination of the actor.[149] Otherwise, no incentive will exist for criminals to act more carefully;[150] they will not be deterred by the possibility of a level of punishment they cannot foresee;[151] and the principle of individual responsibility based on mens rea will be undermined.

Some of the flaws in this form of "transferred intent" are evident, not

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146. It is subject to dispute, however, whether the risk was "substantial" as required by the definition of recklessness and criminal negligence. TEX. PEN. CODE ANN. § 6.03(c)–(d) (Vernon 2003).

147. Retribution and the "evil mind" approach to criminal justice is a throw-back to an early—and one would hope, less progressive—period. *See* Roth & Sundby, *supra* note 10, at 450.

148. I use "caused" here with some trepidation since it can have that meaning only in the "but for" sense. There is no foreseeability.

149. The Model Penal Code reflects this in its treatment of causation for strict liability crimes. *See* MODEL PENAL CODE § 2.03(4) (1985). It provides that "[w]hen causing a particular result is a material element of an offense for which absolute liability is imposed by law, the element is not established unless the actual result is a probable consequence of the actor's conduct." *Id.* This stands in stark contrast to the Texas Penal Code provision on causation, as well as the Texas courts' interpretation of the felony-murder doctrine. *See* TEX. PEN. CODE ANN. § 6.04 (Vernon 2003). The Model Penal Code drafters rejected punishment for strict liability crimes in the absence of legal cause for foreseeability as being unjust. *See* MODEL PENAL CODE § 2.03 cmt. n.4 at 264; DUBBER, *supra* note 121, at 140.

150. *See* FLETCHER, *supra* note 47, at 193 (Felony-murder rule is intended to make robbers more careful.).

151. *See generally* Stephen J. Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497 (1973) (discussing the correlation between punishment and actual harm caused).

in what the court actually approved, but in what might have been done instead in *Honea*. As noted previously, Honea surely could have been convicted of felony-murder, even with the understanding of that doctrine current in 1979.[152] But why bother with felony-murder instead of capital murder? If it is correct, as the court held, that "[a]ppellant clearly intended to rob [the victim]; his acts resulted in the offense of aggravated robbery and he is guilty of that offense"[153] then it would appear to be equally defensible to assert that Honea clearly intended to rob his victim; his acts resulted in the offense of capital murder, and he is guilty of that offense. After all, a killing was done in the course of committing aggravated robbery—one of the acts that make murder into a capital offense—and the result was exactly the same as if Honea had killed his victim intentionally. In the words of section 6.04(b)(1), "the only difference between what actually occurred and what [Honea] desired, contemplated, or risked is that . . . a different offense was committed."[154]

It is preposterous, of course, that a person potentially would be sentenced to death for acting without the intention to do the acts and cause the harm that define the crime of capital murder.[155] But in the "Neverland" of Texas transferred intent, it is not easy to explain why that idea is preposterous. The easy answer seems to be that it would violate substantive due process, the usual resort for outcomes that feel wrong for reasons not readily identifiable. Perhaps the due process explanation lies in the obvious reduction in the State's burden of proof on the culpability element required for intentional murder: proof that the actor negligently caused a death in the course of robbery cannot substitute for the more difficult proof that it be caused intentionally.[156] *Honea* remains the well-settled law in Texas.[157]

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152. *Cf.* Mallard v. State, 162 S.W.3d 325, 333 (Tex. App.—Fort Worth 2005, pet. filed) (no error to give transferred intent instruction in a felony-murder prosecution).

153. Honea v. State, 585 S.W.2d 681, 685 (Tex. Crim. App. 1979).

154. TEX. PEN. CODE ANN. § 6.04(b)(1). This holding also would be supported by the principle in the *Honea* decision that, "one who, intending to commit a felony, accidentally commits another felony, is guilty of the felony actually committed. The intent to commit the contemplated offense transfers to the offense in fact committed." *Honea*, 585 S.W.2d at 685.

155. Apparently it was not so preposterous to the court of appeals in *Gutierrez v. State*, 681 S.W.2d 698, 701 (Tex. App.—Houston [14th Dist.] 1984, pet. ref'd). There, the defendant, who was a party to an aggravated assault on a peace officer that resulted in the officer's death, was convicted of capital murder. *Id.* The jury was instructed that it could convict if "the only difference between what actually occurred (the Capital Murder of Berry McGuire), if it occurred, and what the defendant desired, contemplated, or risked (the felony offense of Aggravated Assault on a Peace Officer, against Berry McGuire) was that a different offense (Capital Murder of Berry McGuire) was committed." *Id.*

156. *See* REAMEY, *supra* note 57, at 411.

157. *Honea* has been cited approvingly many times for the proposition that, "one who, intending to commit a felony, accidentally commits another felony, is guilty of the felony actually committed. The intent to commit the contemplated offense transfers to the offense in fact

Transferred intent, as applied in *Honea*, supplements the felony-murder rule to provide punishment for all manner of unforeseen consequences. It does so in a general, sweeping fashion that essentially subsumes the felony-murder doctrine, leaving prosecutors free to choose whether to employ the more general or more specific rule. A felony-murder, for example, might be based on the general theory of transferred intent rather than the felony-murder statute.[158] When this is done—and in all cases in which general transferred intent is used—not even the pretense of the "act clearly dangerous to human life" limitation exists, and even the most petty crime is susceptible to its application.[159]

V. ENHANCED PUNISHMENT FOR THE UNLUCKY

Criminal responsibility based on harm may be created by defining substantive offenses in a certain way, or by tinkering with the manner in which the burden of proof for the elements of those offenses may be satisfied. Transferred intent in Texas, whether in its general application or in the specific way it is applied to felony-murder, illustrates how culpability can be imputed to persons who probably never imagined causing the harm for which they ultimately were held responsible. Culpability also may be presumed from certain conduct.[160]

Accountability for harm may be achieved more directly, though, simply by adjusting the punishment to match the degree of harm. One clear example of this is the Texas assault statute, where punishments range from only a fine for threatening bodily injury[161] or offensive touching,[162] through high misdemeanor punishment for actually causing bodily injury,[163] to felony assault for causing serious bodily injury.[164] The usual pattern for such offenses, including assault, is to define the offense in traditional

committed." *Honea*, 585 S.W.2d at 685; *see, e.g.*, Loredo v. State, 130 S.W.3d 275, 282 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd). The late-Judge Sam Houston Clinton, writing for the Texas Court of Criminal Appeals in *Price v. State*, discussed the history and apparent legislative intent of section 6.04(b), implying that the language from *Honea* above was inconsistent. 861 S.W.2d 913, 915–17 (Tex. Crim. App. 1993) (en banc).

158. *See, e.g.*, Hilliard v. State, 513 S.W.2d 28, 33 (Tex. Crim. App. 1974) (transferred intent used to justify murder conviction arising from felony assault on child).

159. The language of the Texas transferred intent provision in section 6.04(b) is not limited to felonies, but apparently applies to all Penal code offenses. *See* TEX. PEN. CODE ANN. § 6.04(b)(1).

160. *See, e.g.*, *id.* § 22.05(c) (recklessness presumed for deadly conduct statute if actor knowingly points a firearm at or in the direction of another).

161. *Id.* § 22.01(a)(2) (Vernon Supp. 2004–2005).

162. *Id.* § 22.01(a)(3). If the victim of the offensive touching is an elderly individual or a disabled individual, the offense is a Class A misdemeanor. *Id.* § 22.01(c).

163. *Id.* § 22.01(a)(1).

164. *Id.* § 22.02(a)(1).

culpability terms, for instance, intentionally, knowingly, or perhaps recklessly causing the harm.[165] Harm plays an important role in gauging the seriousness of such offenses, but it is not the sole determinative factor. Rather, it works in tandem with culpability and is limited, to a significant extent by culpability, to arrive at a proportional sentence.

Due to a tragic episode in 1988, however, Texas now has a punishment enhancement provision that defies conventional notions of harm-based punishment commensurate with culpability. In the early morning hours just two days after Christmas, San Antonio Police Officer Patricia Calderon was in foot pursuit of a petty theft suspect when she went into the water[166] of Salado Creek and drowned.[167] Louis "Popeye" Miller, the suspected thief Officer Calderon had been pursuing that December night, was on parole and had an extensive criminal history.[168]

The Bexar County Chief Medical Examiner ruled the officer's death a homicide, "because she died during the pursuit of a suspect,"[169] but Miller was charged only with theft and evading arrest,[170] both of which were relatively minor misdemeanors.[171] No marks or injuries were found on Officer Calderon's body indicating a struggle with the suspect,[172] and the investigating homicide detective[173] said in the early stages of the

165. *See, e.g.*, *id.* § 22.01(a).

166. It is unclear whether Officer Calderon "fell" into the creek, or deliberately went into the water in order to catch the fleeing thief. The brief account contained in the San Antonio Police Department's website indicates that "[b]ecause of poor visibility she fell into the creek." San Antonio Police Dep't, *In Memory–1980s*, http://www.sanantonio.gov/sapd/80smemory.asp (last visited August 15, 2005). An Associated Press story carried by the Dallas Morning News characterized Officer Calderon's action as "plunging into Salado Creek." Associated Press, *Proposal Concerns Police Safety*, DALLAS MORNING NEWS, Dec. 31, 1988, http://nl.newsbank.com/nl-search/we/Archives?p_action (on file with author). A local news report cited unnamed police sources as saying that Officer Calderon "apparently jumped into the water because the suspect swam across the creek." Thomas Edwards & Dino Chiecchi, *Suspect is Arrested in Fatal Police Chase*, SAN ANTONIO EXPRESS-NEWS, Dec. 28, 1988, at 8-A.

167. *In Memory–1980s*, *supra* note 166. Officer Calderon was the first female officer of the San Antonio Police Department to be killed in the line of duty. Edwards & Chiecchi, *supra* note 166.

168. Kym Fox, *Man Jailed after Chase has Long List of Brushes with Law, Courts*, SAN ANTONIO EXPRESS-NEWS, Dec. 28, 1988, at 9-A.

169. Edwards & Chiecchi, *supra* note 166.

170. Thomas Edwards & Don Driver, *Officer's Drowning Sparking Law Effort*, SAN ANTONIO EXPRESS-NEWS, Dec. 29, 1988, at 1-A.

171. Miller allegedly stole cigarettes worth about forty dollars from a convenience store, which would cause the crime to be classified as a Class C misdemeanor punishable by fine only. *See* TEX. PEN. CODE ANN. § 31.03(e)(1)(A) (Vernon Supp. 2004–2005). At the time, evading arrest was a Class B misdemeanor in Texas law. *Id.* § 38.04(c) (Vernon 2003).

172. *See* Edwards & Chiecchi, *supra* note 166.

173. The homicide detective assigned to the case was Lt. Albert Ortiz, who is now the Chief of Police in San Antonio. Albert Ortiz, *Welcome from the Chief*, http://www.sanantonio.gov/sapd/chief.asp?res=1024&ver=true (last visited August 15, 2005).

investigation that there was no evidence Miller was involved in the drowning.[174]

Despite Miller's apparent lack of intent to harm Officer Calderon, San Antonio Police Officers' Association President Harold Flammia said officers were "feeling frustrated and disgusted" that the suspect could not be held responsible for her death.[175] These sentiments were mirrored in remarks made by Texas Senator Frank Tejeda just two days after the incident occurred, when he said, "I felt shock and disappointment when I heard this individual was only going to be charged with just theft, maybe evading arrest."[176]

In order to "clarify" and "strengthen" Texas law to impose criminal responsibility on persons involved in an incident in which a law enforcement officer is injured or dies, Senator Tejeda announced that he would propose legislation to remedy the problem.[177] The "Calderon Law" was enacted by the Seventy-First Texas Legislature in 1989.[178] Section 38.04(b) of the Texas Penal Code now provides that evading arrest is a third degree felony if an officer suffers serious bodily injury, and a second degree felony if the officer dies, as a direct result of an attempt by the officer to apprehend a fleeing suspect.[179] This punishment enhancement is available without regard for the culpability of the person fleeing or the risk assumed by the pursuing officer; the person fleeing need not intend to cause harm to the officer in order to be punished more severely.[180]

Ironically, the Calderon Law was applied in a virtually identical case in 1997, also in San Antonio. Park Ranger Paul Pytel was assisting San Antonio police officers in pursuit of suspected gang members believed to have fired on a group of people.[181] According to a newspaper account at the time, Officer Pytel "either slipped or fell" into six feet of water while wearing his police belt and equipment, including handcuffs, revolver, and

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174. Edwards & Chiecchi, *supra* note 166.

175. Edwards & Driver, *supra* note 170.

176. *Id.*

177. *See id.* Tejeda was quoted as saying that the laws defining responsibility for an officer's death in a situation like Officer Calderon's were "convoluted." *Id.* In fact, the laws were not convoluted at all; they were quite clear that Miller could be held responsible for theft and evading arrest, but not for the death. Police Association President Flammia remarked, "I looked at everything [in the Texas Penal Code] you could possibly see, even reckless conduct, and it just wouldn't fit." *Id.*

178. Tex. S.B. 916, 71st Leg., R.S., 1989 Tex. Gen. Laws 488.

179. TEX. PEN. CODE ANN. § 38.04(b) (Vernon 2003).

180. *See* Jameson v. State, No. 12-01-00374-CR, 2002 WL 31618286, at *3 (Tex. App.—Tyler Nov. 20, 2002, pet. ref'd) (not designated for publication).

181. Gloria Padilla, *Ranger's Drowning Leads to Guilty Pl*eas, SAN ANTONIO EXPRESS-NEWS, Dec. 1, 1994, at 3-B.

radio.[182] Pytel's brother described him as being in excellent physical shape, a person who enjoyed martial arts and outdoor sports, although he did not know how to swim.[183] Two suspects were charged with evading arrest, now potentially a second degree felony, in the officer's death.[184] One of the men subsequently pleaded guilty to evading arrest causing serious bodily injury.

The tragic nature of these cases provides ample explanation for the retributive character of the Calderon Law. Patricia Calderon was married to a police officer; she was the first female San Antonio officer killed in the line to duty, just after Christmas; she was a mother of a ten-month-old child, and was described in glowing terms by her coworkers.[185] Paul Pytel was a fit, young public servant in the prime of life. It is noteworthy that in both cases, the suspects being pursued were not people who would evoke public sympathy. Louis "Popeye" Miller was a parolee who had been committing crimes since he was a teenager.[186] At the time of the incident, he and an accomplice were believed to have stolen cigarettes from a convenience store, and had run from the police.[187] The men who Park Ranger Pytel was after were thought to be gang members who had just shot at a group of people, hitting an eighty-three-year-old man in the leg.[188]

Both cases share another common feature: there was no evidence in either to believe that the suspects tried to harm the officers, intended to harm them, or even could have foreseen that they would come to harm. Following the death of Officer Calderon, San Antonio criminal defense lawyer Mark Stevens was quoted as saying, "They're now trying to create a law that will make everybody feel better . . . . Unfortunately, the criminal law cannot remedy every terrible tragedy that occurs."[189]

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182. Thomas Edwards, *Two Fleeing Suspects Charged in Ranger's Drowning*, SAN ANTONIO EXPRESS-NEWS, Aug. 2, 1994, at 9-A.

183. *Id.*

184. *Id.*

185. Edwards & Chiecchi, *supra* note 166.

186. Fox, *supra* note 168.

187. *See* Edwards & Chiecchi, *supra* note 166.

188. *See* Edwards, *supra* note 182.

189. *See Proposal Concerns Police Safety*, *supra* note 166 (internal quotations omitted). Dave Moran expressed the same concern in an op-ed piece concerning *People v. Bettcher*, a Michigan case in which a driver was prosecuted, and acquitted, in the death of a traffic construction worker. *See* David A. Moran, *Local Comment: Law is Faulty on Construction-Zone Killings*, DETROIT FREE PRESS, May 7, 2003, http://www.freep.com/cgi-bin/forms (on file with author). Ms. Bettcher was not shown to have been driving recklessly or negligently at the time of the accident, but the Michigan law enhanced punishment merely because a construction worker was killed. *See id.* Professor Moran wrote the following:

> The problem with the statute is that it violates the bedrock principle of Anglo-American law that people cannot be branded as felons merely for causing harm. To be convicted of a serious criminal offense, a person must act with criminal intent, that is, one must commit the act purposely, knowingly, recklessly, or extremely negligently.

To assess whether Texas's evading arrest statute can prevent or remedy even this particular kind of tragedy, one must consider the potential scope of its application. The circumstances of the *Calderon* case provide a striking example of the difference in punishment that bad luck can make. If convicted of evading arrest under the law then in effect, the suspect in that case would have been exposed to a maximum incarceration of 180 days in the county jail.[190] Had he been sentenced under the Calderon Law, however, imprisonment would have been for not less than two years, and up to twenty years.[191] Obviously, the difference in these outcomes is vast. The culpability of the offender—or, in this case, the absence of culpability—is exactly the same whether the officer is injured, killed, or unharmed. Because the person evading arrest need not intend to harm the officer,[192] it is irrelevant whether he or she fled carefully. The offense is, in effect, a strict liability crime,[193] despite the fact that it carries a felony punishment far in excess of that usually considered appropriate where no culpability is required.

In another respect, the fate of the offender is left purely to chance. Unlike the broad Texas felony-murder formulation, punishment for evading arrest is not dependent directly on causation. One might argue that if the offender were not evading arrest, the enhanced punishment provision for harm to the officer would not apply, but that argument misses the point of causation. It is not sufficient that the actor be somehow, tenuously connected with an unfortunate result.[194] To hold the actor criminally responsible, he or she must do something that can be anticipated to produce that result. The current evading arrest provision fails to differentiate between an offender who tries to elude an officer by driving the wrong way at high speed on a crowded freeway, and one who is pursued by an officer in seemingly excellent health, in a safe environment, who is struck by lightning or felled by a heart attack.[195]

Id.

190. *See* TEX. PEN. CODE ANN. § 12.22 (Vernon 2003) (describing Class B misdemeanor punishment).

191. *See id.* § 12.33(a) (Vernon 2003) (describing second degree felony punishment).

192. *See* Jameson v. State, No. 12-01-00374-CR, 2002 WL 31618286, at *3 (Tex. App.—Tyler Nov. 20, 2002, pet. ref'd) (not designated for publication).

193. REAMEY, *supra* note 57, at 164 (Enhancement provision for evading arrest is one of "strict liability.").

194. "But for" causation is not sufficient to create criminal liability. *See* DRESSLER, *supra* note 2, at 182–83 (explaining that "actual cause" must also be "proximate cause" of harm for criminal responsibility). If nothing more were necessary, parents presumably would be responsible for the acts of their adult children because, *but for* them having conceived the children, the harm done by their offspring would not have occurred. *See id.*; *see also* DUBBER, *supra* note 121, at 129 (both factual cause and legal cause required).

195. Senator Tejeda reportedly said, in announcing his intention to propose the Calderon

As is true with felony-murder, any deterrent effect of this punishment enhancement scheme is indirect, at best. The offender is punished, not for what she intends, or even for what she does, but for the result. If the officer is careless or reckless in the pursuit, and is injured or killed as a result of his or her own disregard for safety, the offender not only is punished for that result, but is not entitled to any reduction in punishment because of the officer's contributory risk-taking. Comparative fault determines the degree to which a person is civilly liable in Texas, but no formal mechanism exists to compare fault for the harm in an evading case.

It is the very nature of evading arrest "to apply where there has been a non-forceful evasion of arrest."[196] Forceful evasion—resisting arrest, for example—which carries an increased risk of harm to the officer, is addressed separately and with a higher base punishment than evading.[197] This makes sense as policy because resisting is inherently more dangerous and likely to cause harm to the officer or others, than simply fleeing.[198] According to the Texas Court of Criminal Appeals, the purpose of the evading statute is "to deter flight from arrest by the threat of an additional penalty, thus discouraging forceful conflicts between the police and suspects."[199]

The purpose of the evading arrest statute is satisfied, then, whether or not an officer suffers injury in the pursuit. Simply by fleeing arrest, a suspect has committed an independent offense with its own punishment in addition to the punishment attached to the crime for which the arrest is being attempted. Indeed, even if no conviction or punishment is ever obtained for the suspected crime, as long as the arrest is lawful,[200] punishment can be exacted for evading. To demonstrate the perverse nature of the punishment enhancement provision within the evading statute, a person who forcibly resists arrest with a deadly weapon actually is subject to less punishment than one who simply runs from the unlucky police officer.[201]

The net result of Texas's evading arrest punishment is that the lucky are punished in accordance with their fault. Their unlucky counterparts are

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Law, that cases involving an officer who dies of a heart attack, or is run over in a foot chase, would fall within the scope of the proposed law. *See* Edwards & Driver, *supra* note 170.

196. Alejos v. State, 555 S.W.2d 444, 449 (Tex. Crim. App. 1977).

197. *See* TEX. PEN. CODE ANN. § 38.03(c) (Vernon Supp. 2004–2005) (Resisting arrest is a Class A misdemeanor.).

198. *See Alejos*, 555 S.W.2d at 449.

199. *Id.*

200. *See* TEX. PEN. CODE ANN. § 38.04(a) (Vernon 2003) (Evading arrest is flight from a peace officer "attempting lawfully to arrest or detain" the suspect.); *Alejos*, 555 S.W.2d at 449.

201. *Compare* TEX. PEN. CODE ANN. § 38.04(b)(3) (second degree felony if pursuing officer suffers death), *with id.* § 38.03(d) (third degree felony if deadly weapon is used to resist).

punished disproportionately for risking exactly the same result, doing exactly the same act, and having exactly the same state of mind. Chance controls.

VI. GETTING "TWO-FOR-ONE" IS UNLUCKY IN TEXAS

Causation, in the cause-and-effect sense, is not an element of evading arrest; if an officer suffers harm "as a direct result of an attempt . . . to apprehend,"[202] punishment increases. But causation plays its own part in upping the ante for unintended consequences.

James Rathmell was driving while intoxicated when he struck another vehicle, killing both of the women riding in the other car.[203] He was indicted for involuntary manslaughter in both deaths.[204] Following conviction on one of the indictments, Rathmell petitioned for habeas relief in the remaining case on double jeopardy grounds.[205] His writ was denied in the district court, but granted by the court of appeals, which held that the second death constituted the same offense as the first.[206]

Noting that *Blockburger v. United States*[207] is "not precisely applicable to the case at bar,"[208] the Texas Court of Criminal Appeals reversed the lower appellate court, adopting the reasoning of the Supreme Court of Tennessee,[209] in holding that James Rathmell effectively violated the homicide statute twice by his one act because he caused the death of two persons.[210] The Texas court's ruling in this regard was not ground-breaking; indeed, it simply followed the lead of numerous decisions from other jurisdictions reaching the same result.[211] What the case suggests about fortuity is more interesting than its contribution to the understanding of same offense.

There may be no constitutional impediment to charging a driver with multiple deaths arising out of a single act—driving while intoxicated—but the question remains whether doing so is sound public policy. Here, unlike some of the previous examples of fortuity, the actor is culpable, and for some, that settles the question of responsibility. For others, it is sufficient explanation that twice the social harm was done—two deaths occurred—

202. *See id.* § 38.04(b)(3).
203. *See Ex parte* Rathmell, 717 S.W.2d 33, 34 (Tex. Crim. App. 1986) (en banc).
204. *Id.*
205. *Id.*
206. *See id.*
207. 284 U.S. 299 (1932).
208. *Rathmell*, 717 S.W.2d at 35.
209. *Id.* at 35–36; *see also* State v. Irvin, 603 S.W.2d 121, 123 (Tenn. 1980).
210. *Rathmell*, 717 S.W.2d at 36.
211. *Id.* at 35–36.

and the single act deserves exposure to twice the punishment. As with the other examples previously cited, though, the proper role of fortuity remains an unanswered question.

How is deterrence served by such cases? Will the intoxicated driver think, "I really should not drive because, if I kill two people accidentally, I could be charged with two manslaughters instead of one?" Would the actor's calculation of his exposure to punishment, a calculation society hopes he will undertake prior to his criminal behavior, change his decision because the driver finds the possibility of multiple prosecutions so much more daunting that the prospect of a single prosecution, that he elects not to drive? It seems much more likely that the drunk driver will be surprised to learn that such a thing is even possible, than it is that he will be deterred by punishment for multiple deaths, especially when he probably finds it inconceivable that he will cause even one.

More to the point, is the driver more culpable if multiple passengers are killed? Clearly, the answer is no. The degree of culpability remains precisely the same in both cases, and it is purely fortuitous that one drunk driver will kill one person while another will kill two, or three. None of this is to suggest that it is unjust to hold the intoxicated driver responsible for any death he causes. He risked great harm by his conduct, even if he intended none at all. But what he risked is neither greater nor lesser depending on the number of victims who actually die. It is possible that his poor judgment will result in dozens of deaths, but he is not punished for the magnitude of that risk or the mere possibility of multiple casualties, nor is he punished for attempted manslaughter if no one dies.[212] The outcome is determined largely by luck, but at least the possible consequences are vaguely foreseeable, and the driver is culpable for taking the wheel while intoxicated.[213]

Obviously, multiple punishment in such cases must be based on the quantum of social harm actually inflicted, rather than on what was contemplated, anticipated, or risked. It seems to be this very purpose that motivated a recent definitional change in Texas law that expands the reach of enhanced punishment beyond the unlucky intoxicated driver.

Prior to 2003, the Texas Penal Code defined an "individual" as "a

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212. *See* Gonzales v. State, 532 S.W.2d 343, 345 (Tex. Crim. App. 1976) (Involuntary manslaughter negates specific intent to kill.). Of course it also is true that if the drunk driver and others sharing the road are lucky, no one will die, despite his recklessness in driving while intoxicated. In that case, the driver might be apprehended and punished for putting himself and others at risk, or he might be even more fortunate and escape detection.

213. The drunk driver certainly is reckless for knowingly risking great harm. Punishing her as if she had intentionally or knowingly caused one or more deaths, however, would be disproportionate if degrees of culpability have any meaning.

human being who has been born and is alive."[214] Because Texas homicide law makes it a crime unlawfully to cause the death of "an individual,"[215] it was not a criminal offense to harm even a viable fetus.[216] The definition of "individual" was amended, effective September 1, 2003, to include, "an unborn child at every stage of gestation from fertilization until birth."[217] Consequently, a culpable act that injures a fetus is an assault, and if death results, it is a homicide.

Texas was not the first state to criminalize feticide.[218] Unlike many states, however, Texas extends the reach of the offense to nonviable fetuses,[219] and presumably to embryos,[220] because the definition includes "every stage of gestation from fertilization until birth."[221] To date, constitutional challenges to similar statutes in other jurisdictions have not succeeded.[222]

It is not the purpose of this article to explore the constitutionality or the development of such statutes, much of which is centered on the pro-life/pro-choice debate regarding abortion.[223] Rather, it is the random quality imposed on criminal punishment by Texas's inclusion of the unborn in its homicide and assault statutes that bears closer examination.

The first conviction under Texas's new statute exemplifies both the way in which the definition of "individual" will be applied, and some of the several problems raised by its application. Emmanuel Rogers was convicted of capital murder in Dallas in an apparent gang-related retaliation

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214. *See* TEX. PEN. CODE ANN. § 1.07(a)(17) (Vernon 1974) (amended 2003) (current version at TEX. PEN. CODE ANN. § 1.07(a)(26) (Vernon Supp. 2004–2005)).

215. *See* TEX. PEN. CODE ANN. § 19.02(b)(1) (Vernon 2003).

216. *See* S. Jeffrey Gately, *Texas Fetal Rights: Is There a Future for the Rights of Future Texans?*, 23 ST. MARY'S L.J. 305, 309 (1991) (explaining that criminal statutes in Texas do not protect the unborn); *cf.* Cuellar v. State, 957 S.W.2d 134, 139–40 (Tex. App.—Corpus Christi 1997, pet. ref'd) (finding a fetus "born alive" after automobile accident, but who subsequently died, was "individual" for purposes of manslaughter); DRESSLER, *supra* note 2, at 499–500.

217. TEX. PEN. CODE ANN. § 1.07(a)(26) (Vernon Supp. 2004–2005). The term "death" also was amended at the same time to include, "for an individual who is an unborn child, the failure to be born alive." *Id.* § 1.07(a)(49).

218. *See, e.g.*, CAL. PENAL CODE § 187(a) (West 1999); Hughes v. State, 868 P.2d 730, 731 (Okla. Crim. App. 1994); State v. Horne, 319 S.E.2d 703, 704 (S.C. 1984); *see also* CRIMINAL LAW, *supra* note 43, at 729 (noting "about half" of states have extended homicide statute to fetuses).

219. *See* Alan S. Wasserstrom, Annotation, *Homicide Based on Killing of Unborn Child*, 64 A.L.R.5th 671 (1998). Some states do not require the fetus to be viable, but do require it to have passed the embryonic stage. *See id.*; *see also* People v. Taylor, 86 P.3d 881, 883 (Cal. 2004).

220. In *State v. Merrill*, the Minnesota Supreme Court characterized an unborn child as an embryo until the eighth week, and thereafter as a fetus. 450 N.W.2d 318, 320 (Minn. 1990).

221. TEX. PEN. CODE ANN. § 1.07(a)(26).

222. *See* Wasserstrom, *supra* note 219, at 687–89, 729–33.

223. *See* HOUSE COMM. ON STATE AFFAIRS, BILL ANALYSIS, Tex. S.B. 319, 78th Leg., R.S. (2003).

shooting.[224] A pregnant woman was one of four victims killed by the defendant and others.[225] It is unclear from news accounts whether the defendant knew the woman was nine-weeks pregnant at the time of the shooting,[226] but in any event, such knowledge is not required expressly by the relevant statutes.[227] Given the age of the fetus, it is quite possible that the mother's pregnancy was not obvious.

The defense focused on the woman's drug use and the fact that she lived with a drug dealer, evidence presumably offered to support its argument that the fetus might not have been alive when the shots were fired.[228] A medical examiner testified "that . . . the fetus appeared to be healthy at the time of the 2003 shooting."[229] Jurors in the case apparently agreed from the beginning of their deliberations "that the fetus should be considered a human being under the law."[230] While this conclusion may have been supported by the medical examiner's testimony, one of the prosecutors in the case opined, "They weren't looking for proof that the baby was alive at the time of the mother's death."[231]

The prosecutor's remark, if accurate, reflects a very real problem in the application of the new statutory definitions encompassing embryos and fetuses. "Individual" includes only one who is "alive,"[232] whether he or she has been born or not.[233] If, as the prosecutor suggested, the jurors in the Rogers prosecution were not "looking for proof that the baby was alive," they were ignoring proof of an element the State was obliged to prove beyond a reasonable doubt. The very existence of this element contributes to, and illustrates, the importance of luck in determining punishment for a feticide. Had the medical evidence established that the fetus was not alive at the time the woman was killed—a fact that might not have been known even to her—the State would have been unable to establish that the fourth

224. *See* Robert Tharp, *Man Guilty in 2 Deaths: Capital Murder Case Marks 1st Time State Law on Fetuses Used*, DALLAS MORNING NEWS, Feb. 5, 2005, at 1B.

225. *Id.*

226. *See id.*; *see also* Associated Press, *Man Guilty in Deaths of Woman, Fetus*, SAN ANTONIO EXPRESS-NEWS, Feb. 6, 2005, at 10B.

227. *See* TEX. PEN. CODE ANN. §§ 1.07(a)(26), (49) (Vernon Supp. 2004–2005), 19.02(b)(1) (Vernon 2003), 19.03 (Vernon Supp. 2004–2005).

228. *See* Tharp, *supra* note 224.

229. *Id.*

230. *Id.*

231. *Id.*

232. Exactly what "alive" means for a fetus or embryo is not addressed by the new statutory definition. Whether that characterization will turn on unspecified medical criteria, or turn instead on some political, philosophical, or theological determination, eventually will be decided by Texas courts. The basis for such a decision and the decision itself, undoubtedly will be debated hotly, thoroughly questioned, and passionately criticized by those who are disappointed in the courts' holdings.

233. *See* TEX. PEN. CODE ANN. § 1.07(a)(26) (Vernon Supp. 2004–2005).

"individual" (the fetus) was killed by the defendant, because the fetus would not have been an "individual" within the statutory definition.[234]

It also was bad luck for the defendant that the woman was pregnant in the first place, but that piece of misfortune would have provided no defense to the homicide charge. Despite his ignorance (if he was) about the existence of a fetus who would be "killed" by his gunshot,[235] the defendant was subjected to twice the punishment[236] for the single act that ended the mother's life, not unlike the intoxicated driver who kills two passengers riding in another car he hits while driving.[237] The existence of one or more fetuses or embryos determines the exposure to punishment the actor faces, whether or not he knows of their presence,[238] and regardless of whether the woman who is pregnant is herself aware of her condition.

Not surprisingly, cases already have arisen in Texas in which the apparent purpose of the killer was to cause the unborn child to die.[239] In such cases, the actor not only is exposed to punishment for committing two (or more) murders, but he or she also may be prosecuted for capital murder on one of two theories.[240] The first of these is that intentional murder is aggravated when "the person murders more than one person . . . during the

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234. Would an attempted murder prosecution succeed if the fetus's "death" preceded the act of the defendant? This question leads to one of the law professors' favorite conundrums: the role of legal and factual impossibility in the law of attempts. *See* DRESSLER, *supra* note 2, at 396–404. While the Model Penal Code approach to impossibility is more concerned with the dangerousness inherent in the fully culpable actor, than in whether the attempted crime is actually a "crime," Texas has adhered—at least in theory—to the traditional view that legal impossibility is a defense for attempts. *See id.* at 403; *see also* Chen v. State, 42 S.W.3d 926, 929 (Tex. Crim. App. 2001) (legal impossibility is a defense in Texas). Attempting to kill someone already dead is a classic example of legal impossibility. *See* DRESSLER, *supra* note 2, at 402 (shooting a corpse believing that it is alive is an example of "hybrid legal impossibility").

235. Assuming that the fetus was not killed directly by the bullet, but rather by the death of the mother, the gunshot was a "but for" cause of the fetus's death, but perhaps not one that would be foreseeable to him.

236. Of course, the punishment also could be triple or quadruple that attached to a single death, depending on whether there were multiple fetuses.

237. *See, e.g.*, *Ex parte* Rathmell, 717 S.W.2d 33, 36 (Tex. Crim. App. 1986) (en banc) (holding an intoxicated driver responsible for two deaths resulting from a vehicular collision); *see also* HOUSE COMM. ON STATE AFFAIRS, BILL ANALYSIS, Tex. S.B. 319, 78th Leg., R.S. (2003) (stating the death of a fetus "would be treated exactly like the death of children in the back seat").

238. There is no statutory language in Texas requiring knowledge of the pregnancy. *See* TEX. PEN. CODE ANN. § 1.07(a)(26); *cf.* People v. Taylor, 86 P.3d 881, 884 (Cal. 2004) (knowledge of pregnancy not required in feticide).

239. *See, e.g.*, Ron Nissimov & Eric Hanson, *"Passion" Case may Test New Law*, HOUS. CHRON., March 27, 2004, at A1 (The defendant allegedly killed his pregnant girlfriend "because she told him she was pregnant with his child."); Andrew Tilghman, *Cases Test Law Giving Legal Rights to Fetuses*, HOUS. CHRON., April 26, 2004, at A1 (defendant allegedly knew girlfriend was pregnant and "intended to kill both the woman and the fetus").

240. TEX. PEN. CODE ANN. § 19.03(a).

same criminal transaction,"[241] a provision that seems more likely to have been designed to target terrorists or other mass murderers.[242] An alternative theory of prosecution for capital murder exists if a "person murders an individual under six years of age."[243] Offenders need not know the age of the child victim in order to be convicted under this provision.[244]

A capital murder must be predicated upon an intentional or knowing killing.[245] Consequently, if the killer intentionally kills the mother but does not intend to cause the death of the fetus or embryo, a question arises as to whether the second, fetal death may be used to enhance the murder to a capital offense.[246] In a practical sense, however, the actor who knows his victim is pregnant would be aware that killing the mother usually is "reasonably certain" to cause the death of the fetus or embryo, qualifying the fetal death as murder caused at least "knowingly,"[247] and eligible for capital murder prosecution.

As noted, the increased measure of social harm represented by the lost unborn life is the apparent justification for punishing an unintended feticide. Where the mother of the embryo or fetus causes its death, however, Texas law exempts the mother from punishment, and that exemption extends to all homicides and assaults, even intentional killing and those caused by the mother's self-induced intoxication.[248] The Texas Legislature undoubtedly was concerned with running afoul of the limited constitutional right of the woman to choose abortion,[249] but the sweep of these exemptions from criminal responsibility greatly exceeds that concern. Why should a person who inadvertently caused the death of a fetus or embryo face felony

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241. *Id.* § 19.03(a)(7)(A).

242. *See* Corwin v. State, 870 S.W.2d 23, 28 n.5 (Tex. Crim. App. 1993) (en banc) (Sponsors of H.B. 8 proposing the provision "made it clear that subsection (A) of what would become § 19.03(a)(6) [,predecessor of 19.03(a)(7),] . . . was meant to cover 'mass' murders, such as terrorist bombings or the killing of a number of people in a bar at the same time.").

243. *See* TEX. PEN. CODE ANN. § 19.03(a)(8).

244. Black v. State, 26 S.W.3d 895, 898 (Tex. Crim. App. 2000) (en banc). The Texas Court of Criminal Appeals noted in its opinion that "[t]he legislature has decided that offenders who intentionally or knowingly kill shall bear the risk of a capital-murder conviction if their victim is under six." *Id.*

245. *See* TEX. PEN. CODE ANN. § 19.03(a) (An offense is capital murder if a "person commits murder as defined under Section 19.02(b)(1)" and one of the aggravating factors is present.); *id.* § 19.02(b)(1) (Vernon 2003) ("A person commits an offense if he . . . intentionally or knowingly causes the death of an individual.").

246. Unlike non-capital murder, the capital defendant must know of the existence of the fetus or embryo. Presumably, a mistake of fact defense would be available in a capital murder case in which the defendant reasonably, but mistakenly, believed that the fetus had been aborted or died, or that the woman was not pregnant. *See id.* § 8.02 (Vernon 2003).

247. *See id.* § 6.03(b) (Vernon 2003).

248. *See id.* §§ 19.06(1), 22.12(1), 49.12 (Vernon Supp. 2004–2005).

249. *See* HOUSE COMM. ON STATE AFFAIRS, BILL ANALYSIS, Tex. S.B. 319, 78th Leg., R.S. (2003) ("SB 319 would not infringe in any way on a women's constitutional right to abortion.").

punishment for that outcome, while the mother of the child faces none, even though she intentionally produces the same result? If the State's interest in the life of the unborn fetus warrants criminalizing acts that extinguish that life, how is its interest less important simply because the mother causes the death? To differentiate treatment in this way suggests that mothers have a right to dispose of their children as they please, that is, that their personal interest in their unborn always trumps that of the State, which clearly is not the case with children born alive.[250] If it is bad policy to punish mothers for harming the unborn, why is it good policy to punish all others?[251]

Fortuity plays a pervasive role in this latest effort by Texas to punish "bad people,"[252] a category which, ironically, does not include mothers who injure or kill their own fetuses. Use of fortuity in this instance is not wholly justified by the State's interest in the unborn, nor is it merely a recognition of the broader social harm that attends a life unlived. Were either of these the grounds upon which Texas's feticide law is based, there would be no exemption for mothers depriving the State and society of the benefits of that life. Culpability or blameworthiness, in the narrow sense, also cannot be the motivating factor, at least in the absence of a requirement that the defendant know of the pregnancy in order to be held criminally responsible. For the same reason, deterrence is not served by this approach because, except in the case of the person who acts with full knowledge of the multiple deaths his or her single act will produce, one cannot be deterred effectively by an unforeseeable consequence.

Even if the goal of the statutes is to punish bad people, that goal is achieved only randomly. Some bad people will be prosecuted for capital murder for their intentional killings, while others will do precisely the same act with the same motivation, and will be subjected to a single, non-capital murder prosecution.[253] Other "not-so-bad people" will find themselves

250. For example, parental rights may be terminated for lesser transgressions, including simply abandoning the living child. TEX. FAM. CODE ANN. § 161.001(1)(a) (Vernon 2002).

251. My purpose in raising these questions is to highlight the inconsistency in Texas's position on feticide, and not to suggest that it is good or bad public policy to punish those who harm fetuses or embryos. The bill analysis for this legislation contains summaries of statements made by those favoring and opposing the amendments creating feticide, and *all* of the arguments focus on the potential effect this bill ultimately will have on the question of abortion. *See* HOUSE COMM. ON STATE AFFAIRS, BILL ANALYSIS, Tex. S.B. 319, 78th Leg., R.S. (2003). While that is undoubtedly a matter of serious concern and rational disagreement, it is striking that no questions appear to have been raised regarding the random way in which this new law would distribute criminal punishment. *See id.* The preoccupation with the more visible and emotionally-charged abortion issue seems to have precluded any meaningful consideration of the role of proportionality or individual blameworthiness prior to the bill's passage.

252. Punishing people for being "bad" amounts to retribution, it is punishment based on just deserts. *See* DRESSLER, *supra* note 2, at 16.

253. *See* Sanford H. Kadish, *Forward: The Criminal Law and the Luck of the Draw*, 84 J.

facing multiple murder or manslaughter punishments for a single act, without any premonition—much less intent—that one of the "victims" even existed. Neither retributivism nor the "just deserts" theory is served by the increased punishment of these unintended, unforeseen consequences, because the actor's punishment does not vary in accordance with the degree to which he is "evil." It varies depending only on whether she is lucky.

VII. BAD LUCK TAKES MANY FORMS

Some will view these examples of fortuity as unjust punishment meted out randomly to the unsuspecting. Others will consider them to be illustrations of appropriate, proportionate consequences for persons who cause great harm. The latter view will appeal to those who embrace the notion prevalent in tort law that one is not entitled to a reasonable, careful, healthy victim, but must accept the victim one actually gets.[254] Without commenting on the soundness of this view in assessing civil liability, it proceeds from the same beginning point as open-ended transferred intent, felony-murder, and other outcome-based punishments. Someone must (should) be held accountable for harms actually done, and it is just to visit that accountability on the person who did the initial culpable act that ultimately led to the harm. Leo Katz describes this position:

> Murder, rape, and larceny have to be committed intentionally, or at least knowingly. That's not required for crimes like manslaughter or battery. Here it's enough that the defendant was reckless or negligent. You may balk at this. The speeding driver who loses control of his car and hits a pedestrian didn't have "harm on his mind," no more so, it seems, than if he had done so in an unforeseen epileptic fit. He probably deeply regrets what happened. Aren't we blaming him for something that befell him rather than for something that he did? Not really. Unlike the surprised epileptic, he knew of precautions he could have taken to reduce the risk of an accident—driving more slowly, taking a nearby highway. In a way, he did have "harm on his mind," the harm of risk to others. That makes him blameworthy and deserving of punishment.[255]

Katz's example is useful as a way to think about how far Texas law departs from the unremarkable notion that a criminally negligent, or reckless, driver should be punished for injuring another.

CRIM. L. & CRIMINOLOGY 679, 679–82 (1994) (explaining the "harm doctrine" is irrational in its failure to punish those lucky persons who nevertheless are culpable).

254. *See* VINCENT R. JOHNSON, MASTERING TORTS 112–13 (2d ed. 1999) (defendant must take plaintiff "as is").

255. LEO KATZ, BAD ACTS AND GUILTY MINDS: CONUNDRUMS OF THE CRIMINAL LAW 191 (1987).

Katz asks whether we are blaming the driver for "something that befell him rather than for something that he did."[256] An element of luck is present in this example, as it is in virtually every outcome connected with criminal activity. It is unlucky that the thief is hungry, or that he lacks the moral character or understanding of law that would restrain him, or that his seemingly safe crime caused someone to be injured, or that the person injured was harmed to a degree beyond reasonable expectation, or that the thief was detected, or apprehended, or prosecuted, or convicted. Some of this "bad luck" was the fault of the person,[257] some was luck-of-the-draw.[258] At what point, if any, should the thief—an unsympathetic figure—be relieved of responsibility because of misfortune? Katz's illustration implicitly suggests one answer: the driver should not be held accountable for an "unforeseen epileptic fit." A speeding driver usually will be lucky, and will not be caught or cause anyone any harm, if it were otherwise, there probably would be far fewer speeders. If she is not lucky, however, and hits a pedestrian, Katz is correct that she had "harm" on her mind—culpability—in the form of risk-taking. If the driver is a known epileptic, driving also involves conscious risk-taking, and justifies punishment for any harm caused.

A driver who does not know she is epileptic, though, is not aware of any risk posed by her driving, not because there is none, but because she has no basis for knowing of it, and it is not foreseeable to her. Presumably, that driver would not be held responsible for engaging in precisely the same behavior as the known epileptic, and for causing exactly the same bad result. So too, the thief or arsonist or batterer is justly held responsible, not just for the harm intended, but also for the harm risked. That risk, however, ordinarily justifies criminal responsibility only where it is "substantial," that is, where it is sufficiently likely to produce harm that a person either is actually aware of the risk, or should be.[259] Should the risk be unknown and one that not even a reasonable person would anticipate,[260] as in the case of

256. *Id.*

257. A certain degree of "bad luck" in a person's situation or character simply is overlooked by criminal law, although extreme examples, like insanity, are not. To a significant extent, fortuity is pervasive. *See* Eric Lotke, *Reflection and the Limits of Liability: Necessary Blindness in the Legal System*, 54 OHIO ST. L.J. 1425, 1446 (1993).

258. Good luck also impacts punishment, of course. When it does, similar concerns are raised because the culpable person "catches a break" and escapes more severe punishment despite his blameworthiness. *See* Kadish, *supra* note 253, at 679–82 ("harm doctrine" is irrational). *But see* Loewy, *supra* note 2, at 283, 288–90 (use of harm to determine punishment is virtually universal).

259. *See* TEX. PEN. CODE ANN. § 6.03(c)–(d) (Vernon 2003); REAMEY, *supra* note 57, at 120 (comparing recklessness and criminal negligence).

260. Unawareness of substantial risk is criminal negligence only if the failure to perceive it "constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint." TEX. PEN. CODE ANN. §

the undiagnosed epileptic, it seems unjust to punish the risk-taker for a result that "befell him rather than . . . something that he did."[261]

Distinguishing "personal-fault-plus bad luck" from "there-but-for-the-grace-of-God bad luck" is a useful way to begin to decide whether harm-based punishment is just. Viewing the examples of misfortune described in this article through this simple lens reveals how likely it is that people in Texas will be punished for their ill-fortune more than for their personal fault.

Felony-murder, despite criticism of the doctrine, has been accepted rather widely as a permissible way to further deter people from committing felonies, especially dangerous ones. Because it includes the potential of deterrence, and appears from the language of the Texas statute to be limited to felonies done in a dangerous fashion, the rule lacks the sweep found in some other harm-based enhanced punishments. Further, culpability is required, at least for the underlying felony.[262]

The very purpose of felony-murder, however, is to punish as murder a death that was not the goal of the felon, and may not have been entirely foreseeable. If foreseeability, as in Katz's example, separates culpable bad luck from pure happenstance, felony-murder logically should be employed only in those cases in which the felon commits "an act clearly dangerous to human life."[263] Doing a clearly dangerous act is risky, and death may result. The actor is blameworthy for this disregard of risk, and some punishment is just, as it is for the speeding driver.

The existence of fault does not settle the question for Texas felony-murder law, however, either on its face or as it has been interpreted. First, it is entirely possible, and in many cases must be, that the risk taken by the felon during the commission of his crime was insufficiently substantial to support a murder conviction. Risk-taking, except when it reaches the level of reasonable certainty,[264] justifies no more than a manslaughter conviction, and not murder.[265] Secondly, the "act clearly dangerous" requirement, as noted earlier, has not always been applied with rigor. If it suffices for felony-murder, in spite of the statutory language, that a person died because of some not-very-dangerous act by the felon, the felon essentially is punished for something "that befell him." If there is a difference in this case

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6.03(d).

261. *See* KATZ, *supra* note 255, at 191.

262. *See* TEX. PEN. CODE ANN. § 19.02(b)(3).

263. *Id.* This "act clearly dangerous" language is the Texas formulation. Other states restrict the reach of felony-murder in other ways.

264. When an outcome is known by the actor to be reasonably certain, he is said to have acted "knowingly," which satisfies the culpability requirement for murder. *See id.* §§ 6.03(b), 19.02(b)(1).

265. *See id.* § 19.04(a).

and that of the undiagnosed epileptic driver, it is only that the driver is more "innocent" at the outset in the eyes of the law because she was not engaged in a felony at the time. The debt owed society for committing a felony, though, is paid by its own, separate punishment. Supplementing that punishment by also punishing the actor for murder simply because the actor's timing was bad, seems no more appropriate or proportionate than charging the speeding driver with "speeding-murder" for a death occurring in a traffic accident not caused by grossly excessive speed. The co-existing misconduct just has nothing to do with the death.

The same problems attend use of a broader version of transferred intent. Particularly if the Texas transferred intent statute[266] is read liberally to allow relatively lower levels of culpability to suffice for offenses typically requiring greater levels, application of transferred intent takes on the feel of a lottery rather than punishment commensurate with the risk actually taken. In some such cases, it ceases to deter at all, except in the most general, indirect, and probably ineffective sense.

The more recent punishment enhancement provisions for evading arrest and Texas's feticide statutes also lack any significant deterrence effect, but they go even further than prior statutes in removing punishment from the control of the actor.[267] In theory, if not in practice, the felony-murder statute promises the would-be felon that if she commits her crime safely, there will be no murder charge for any death that coincides with the felony. No similar limitation exists in either of the more recent punishment-enhancement laws.

A person evading arrest may flee as carefully as possible and, owing to the bad luck, poor coordination, lack of skill, imprudence, or frail physical condition of the pursuing officer, find himself convicted of a felony with a mandatory prison sentence rather than a relatively minor misdemeanor. If the thief is fortunate enough to be pursued by a store employee instead of a peace officer, his evasion from apprehension is not punished at all, regardless of what happens to the pursuer, and despite the fact that the store

266. *See id.* § 6.04(b).

267. Michael Moore addresses the importance of control in assessing punishment in this way:

> It cannot matter to an offender's just deserts whether the wind, a bird, or a quantum shift moved the bullet that an offender sent on its way, intending to kill another, for these causal influences are wholly beyond the control of the offender. What he can control is whether he intends to kill and whether he executes that intention in a voluntary action of moving his finger on the trigger; all the rest is chance. The offender deserves to be punished only for factors he can control, not for those chance events he can't control.

Michael S. Moore, *The Independent Moral Significance of Wrongdoing*, 5 J. CONTEMP. LEGAL ISSUES 237, 239 (1994).

employee or any other citizen has a legal right to arrest the offender.[268]

Texas feticide is, if anything, even more random. Neither the actor nor the mother need know of the pregnancy, or that the act would be likely to cause the death of the fetus or embryo. Some "bad people" who injure or kill a woman will be lucky and avoid homicide or assault punishment for harming the fetus, either because none exists or because their conduct does not produce the harm. Others will not be so lucky. Some "not-so-bad" people will be unlucky and receive unexpected punishment because an act that could not be expected to harm a healthy woman who is not pregnant (and, in fact, did not harm her), might harm an embryo whose existence is unknown. The unlucky of both sorts understandably will not comprehend why even a very bad mother who intentionally kills her fetus is exempted from punishment.

The use of "lotteries" such as these to determine punishment in Texas produces seemingly unjust results because they are based on harm rather than "just deserts." Larry Alexander questions the justification for harm-based punishment lotteries in this way:

> The question I would raise is, assuming punishment lotteries are both permissible and socially useful, why should we choose the causation of harm—rather than, say, drawing a certain color lot—as the event that determines the lottery's outcome? Cause-in-fact is sometimes difficult to prove, and proximate causation is a muddle. Why not just run a real lottery and draw lots? What benefits do we obtain from the harm lottery that justify its extra costs?
>
> I cannot answer these questions. Perhaps a proponent of the materiality of harm causation can. Until answers are forthcoming, the use of harm causation as a form of punishment lottery has not been justified, even if punishment lotteries themselves are justifiable.[269]

Placing emphasis on culpability, rather than on harm, is a more intuitively and rationally satisfying way to assess punishment because it is less random and arbitrary, and more reflective of the individual fault of the actor.[270] Some degree of "bad luck" may persist but be ignored even though one is focused on moral fault,[271] but the worst of the bad luck outcomes can be avoided.

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268. *See* TEX. CODE CRIM. PROC. ANN. art. 18.16 (Vernon 2005) (authorizing any citizen to arrest without warrant a person who has committed a theft).

269. Larry Alexander, *Crime and Culpability*, 5 J. CONTEMP. LEGAL ISSUES 1, 28 (1994).

270. As Alexander observes, "The case for the centrality of the culpable act rests not on concerns about luck, but on the nature of retributive desert." *Id.* at 30. Sanford Kadish seems to agree that the reliance on luck is "not rationally supportable," although he addresses the harm doctrine by considering whether punishment should be reduced, rather than increased, where harm does not coincide with culpability. *See* Kadish, *supra* note 253, at 679–82.

271. *See* Lotke, *supra* note 257, at 1447 (Legal doctrines conceal a great deal of bad luck.).

This tendency to punish bad people for what they cause, even if it is the result of bad luck, may be unavoidable to some extent. It is, after all, axiomatic that "hard cases make bad law."[272] The instances in which Texas courts and the Texas Legislature have departed from traditional reliance on culpability to impose harm-based punishment, generally have involved these "hard cases." They were not "hard" because the legal concepts were complex, so much as they were "hard" because tragic harms often befell innocent people. The natural inclination to attach blame—and retribution—to those who contribute to tragic harm is exacerbated by their moral failings, although those failings may not have caused the harm in any foreseeable way, or contributed to it.

By exploiting the opportunities in pre-existing law, and creating new opportunities to punish randomly the "bad people" who cause tragic harm, Texas's courts and legislature risk undermining confidence in criminal justice within the state. We may not identify or sympathize easily with all of those whose actions produce such harm, but reliance on just deserts rather than the pull of retribution will establish a moral authority in the pronouncements of the legal institutions of Texas that cannot coexist in a system in which criminal responsibility turns primarily, and sometimes exclusively, on chance.

272. *See* J. Hiram Moore, Ltd. v. Greer, No. 02-0455, 2005 WL 1186334, at *4 (Tex. May 20, 2005) (Hecht, J., concurring) (not released for publication) (stating "hard cases make bad law" is a "very venerable" principle); *see also* N. Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting) ("Great cases like hard cases make bad law.").